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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. ~~1065~~ 171

HUGH BRYSON,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

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PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit.

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on November 30, 1956.

CITATION TO OPINIONS BELOW.

The opinion of Judge Murphy, denying petitioner's motions to dismiss the first[1] indictment brought against him,

[1] There were *three* indictments returned against petitioner before he was finally brought to trial.

to compel an election between the "membership" and "affiliation" counts of the indictment, and for a bill of particulars, is reported at 16 F.R.D. 477; the opinion of Judge Carter denying similar motions directed to the second indictment is reported at 16 F.R.D. 450; the opinion of Judge Goodman dismissing, on the Government's motion, both these indictments after the Government had filed a third indictment in the District of Columbia, is reported at 16 F.R.D. 453; the opinion of Judge Murphy vacating an order entered by Judge Morris in the District of Columbia proceeding granting petitioner's motion for a bill of particulars, is reported at 16 F.R.D. 431. All of the foregoing opinions and orders are set forth in the Appendix hereto. Other orders and opinions of the trial court are to be found in the Clerk's Record on Appeal herein.

The opinion of one panel of the court below granting bail to petitioner pending his appeal is reported at 238 F.2d 775;[2] the opinion of another panel of the court below which affirmed the conviction is reported at 238 F.2d 657; its opinion upon a denial of a petition for rehearing is not yet reported.[3] All of the opinions of the court below are printed in the Appendix hereto.

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[2]This panel consisted of Chief Judge Denman, and Circuit Judges Bone and Orr. This was the only time that any member of the Court of Appeals wrote on any issue of this case. Cf. n. 3, *infra*.

[3]The affirming panel consisted of two District Judges and one Circuit Judge. The opinion was written by one of the District Judges. This, like *Western Pacific Railroad Corp. v. Western Pacific Railroad Co.*, 197 F.2d 994, 1013 (9 Cir., 1952), is a case in which "no member of the Court of Appeals has written a line on the merits." Cf. *Western Pacific Railroad Corp. v. Western Pacific Railroad Co.*, 345 U.S. 247, 263 264.

JURISDICTION.

The judgment of the Court of Appeals for the Ninth Circuit was entered on November 30, 1956 (238 F.2d 657; App. 29, 50). A timely petition for rehearing was denied on April 12, 1957 (..... F.2d .....; App. 45, 51). On May 3, 1957, Mr. Justice Douglas entered an order extending until June 7, 1957, the time within which petitioner might file this petition. The jurisdiction of this Court is invoked under 28 U.S.C.A. 1254(1).

QUESTIONS PRESENTED.

The Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court for the Northern District of California, entered on a jury verdict finding petitioner guilty on one count of a two-count indictment which charged him with making a false statement in an affidavit filed with the National Labor Relations Board. The alleged false statement was that in April of 1951 petitioner was not "affiliated" with the Communist Party.[1]

The questions presented are:

1. Whether the term "affiliation" as used in Section 9(h) of the Taft-Hartley law was unconstitutionally applied to petitioner in that—

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[1]The jury acquitted petitioner of the charge that he had falsely denied membership in the Party (R. 1182). Prior to trial the Government had voluntarily dismissed a third count charging that petitioner had falsely denied "support" of the Party.

"R" refers to the Reporter's transcript of testimony, three copies of which, in typewritten form, were filed with the Clerk of the court below, pursuant to permission to prosecute the appeal on such a record.

(a) neither the affidavit nor the indictment advised petitioner with reasonable certainty of the meaning of the term, contrary to the requirements of the Fifth Amendment;

(b) neither the affidavit nor the indictment warned petitioner that this Court's interpretation of the term in *American Communications Association v. Douds*, 339 U.S. 382, was not regarded by the Government as binding;

(c) neither the proof nor the charge complied with the requirements set forth in *American Communications Association v. Douds, supra.*

2. Whether the trial court's instruction on "affiliation"—

(a) defined the term in a manner contrary to this Court's decision in *Bridges v. Wixon*, 326 U.S. 135;

(b) failed to provide the jury with any legal standards by which to determine what was meant by the term;

(c) permitted the jury to convict petitioner solely upon the basis of activities protected by the First Amendment.

3. Whether the conviction is supported by proper and competent evidence.

4. Whether prejudicial hearsay testimony respecting Communist Party "policy" was received against petitioner, contrary to the rules of evidence and prior decisions of this Court.

5. Whether the perjury rule is applicable to a prosecution for false swearing under 18 U.S.C.A. 1001, and if so, whether it was complied with here.

6. Whether the petitioner had a right to interview members of the jury after the verdict in order to de-

termine whether extraneous influences affected their understanding of the term "affiliation" and thereby unlawfully influenced the verdict.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED.

Statutes Involved.

Section 9(h) of the Labor Management Relations Act of 1947 (29 U.S.C.A. 159[h]) which provides for the filing of the affidavit in question reads, in relevant part, as follows:

> "No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization * * *, and no complaint shall be issued pursuant to a charge made by a labor organization * * *, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization * * * that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35(A) of the Criminal Code shall be applicable in respect to such affidavits."

18 U.S.C.A. 1001, which superseded Section 35(A) of the Criminal Code,[3] reads:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and wilfully falsifies, conceals or covers up by

[3] See 29 U.S.C.A. 159, *Historical Note*.

any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Constitutional Provisions Involved.

The First, Fifth and Sixth Amendments to the Constitution of the United States, upon which petitioner relies, read as follows:

"Amendment 1: Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

"Amendment 5: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

"Amendment 6: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law,

and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

STATEMENT OF THE CASE.

On April 21, 1951, petitioner executed the affidavit required by the Board pursuant to Section 9(h). This affidavit, on the printed form provided by the Board, was filed in Washington, D. C., on April 26, 1951, and became the basis for the proceedings here.

The first and second indictments, each in two counts, charged that the affidavit contained two false representations: that he was not a member of, and that he was not "affiliated" with, the Communist Party. The filing of two separate indictments resulted from the existence of problems relating to venue jurisdiction. Cf. *United States v. Valenti*, 207 F.2d 242 (3 Cir.). Motions to dismiss these indictments, to compel an election between the two counts,* and for a bill of particulars, were denied by the trial court (16 F.R.D. 450, 478; App. 1, 3).

Thereafter, the Government filed a third indictment in Washington, D. C., later obtaining leave to dismiss both

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*The prejudice resulting to petitioner from the denial of the motion to compel an election, which was addressed to all three indictments and renewed during the trial (R. 1085-G; 1085-DDD), became apparent with the verdict of acquittal on the first count. For, if the Government had been compelled to proceed on the "membership" count alone, the acquittal would have ended the case. On the other hand, if it had chosen to proceed on the "affiliation" count, much of the evidence it offered would not have been relevant. Indeed, the Government adduced no evidence specifically directed to that count alone.

California indictments (16 F.R.D. 453; App. 7). The Washington indictment, unlike its predecessors, was in three counts. The first and second dealt with "membership" and "affiliation", while the third alleged that the affidavit contained yet another false statement: that Bryson did not "support" an organization that believed in or taught the overthrow of the United States Government by force.[2]

A motion to dismiss the last indictment was denied, but motions for a list of Government witnesses, for discovery and inspection before trial, for the production of certain documentary evidence, and for a bill of particulars were granted (App. 9-11). Certain admissions relating to the authenticity and mailing of the affidavit were made by petitioner (R. 29-30) and certain stipulations were entered into between counsel respecting the venue issue; an order was thereafter made transferring the proceedings from Washington, D. C., to San Francisco. At the time of the transfer the Government had not furnished the bill or made discovery. Instead of so doing, it obtained an order in California vacating the Washington order (16 F.R.D. 431; App. 12-22). Petitioner thereupon sought unsuccessfully to be relieved of the admissions and stipulations entered into in Washington, D. C. After the decision in *United States v. Lattimore*, 127 F.Supp. 405 (D.C. D.C.), a supplemental motion to dismiss the third ("support") count of the indictment was filed; before a ruling the Government on its own motion dismissed this count. The case

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[2] Venue in the District of Columbia was based upon the allegation that Bryson did "use and file, or cause to be used and filed" the affidavit "with the * * * Board in the City of Washington, District of Columbia."

ultimately went to jury trial only on the "membership" and "affiliation" counts.

The Government, of course, was required to prove that petitioner was a "member" of, or "affiliated" with the Communist Party in April of 1951, when the affidavit was executed and filed. To sustain this burden the Government offered evidence, without discrimination between the two counts, that between 1937 and 1947 petitioner, as the court below put it, "attended many Communist Party meetings."[8] He solicited new members and participated in the expulsion of old ones. He was a member of the county and state committes of the Party. He acted as chairman of some meetings and gave 'educational' talks at others.[9] In one of these talks to new members he stated 'When you are in the Communist Party you accept discipline. You ask no

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[8]Cf. the following from Judge Pope's concurring opinion in *Bridges v. Wixon*, 199 F.2d 811, 836 (9 Cir.), reversed on other grounds, 346 U.S. 209: "The logical fallacy in concluding from this that Bridges must therefore have been a Party member is that it assumes the truth of that which is sought to be proven. If, in fact, Bridges was not a Party member, his presence at such a meeting would mean no more than that he attended a meeting at which every other person present was a Party member." The record in the case at bar shows the attendance of non-members at "Party meetings" (R. 55; 307-308; 319).

[9]The content of such talks is not revealed by the record. (See R. 196-197.) Insofar as petitioner is reported to have said anything at any of these meetings, the record reveals that once, in 1941 or 1942, he spoke on "a current economic issue that was a hot issue on the waterfront"; once, in the same period, on the need for a second front in Europe (R. 392-393); and once, in 1947, on the Taft-Hartley law (R. 497). Nothing in the record shows that Bryson ever spoke of, much less taught or advocated, any proscribed doctrine, or even that he ever spoke of, or attended meetings where others spoke of, Marxism-Leninism.

questions . . . for the good of the Party you carry out any order that is given to you from the top fraction and you ask no questions'."[10] (235 F.2d 659; App. 30).

Most of this evidence dealt with the years 1937 to 1941; none of it dealt with any period later than 1947—four years prior to the time petitioner signed the affidavit.[11] There was no testimony of any Communist activity whatsoever during the period between 1947 and 1951 when the affidavit was executed.[12] The court below itself remarked on the "absence of evidence of Bryson's active participation in Party functions after 1947" (235 F.2d 661; App. 35).

Finally, there was testimony that, three months after the affidavit was signed, petitioner said either he was proud to be a member of the Party (R. 557), or he was proud that one had to be a member to get an assignment slip to a job (R. 648), or that he was "still a Communist and proud of it" (R. 697). These alleged statements[13]

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[10]This particular "talk" occurred in the summer of 1937 (R. 60-64).

[11]There was testimony that at a meeting in 1947 the "trade union director of the Communist Party . . . announced that it would be Party policy for Party members in labor unions to boycott the Taft-Hartley Act . . . but [if necessary] they would resign from the Party in name only but remain in close touch and allegiance with the Party." Petitioner is alleged to have said "in reply" that he saw no need to comply then but might have to do so in the future (238 F.2d 660-661; App. 31).

[12]There was testimony that in 1948 Bryson had urged a witness "to go to Georgia and get signatures for the Progressive Party", and that in 1949 he had an argument with a union member who had, some years earlier, passed up an opportunity to join the Party (238 F.2d 660; App. 32).

[13]However, it was the witnesses, not petitioner, who used the words "Communist" and "party" (R. 567, 595, 648); they "assumed" that petitioner meant the same thing that they did (R.

were said to have been made, shortly after the signing of the affidavit, to three bitter enemies at a time when they were organizing a rival union (R. 932-941).

At the conclusion of the Government's case, a motion for judgment of acquittal was made (R. 719-F) and denied (R. 719-HHHH).

In his defense, Bryson called some sixteen witnesses, many of whom directly contradicted prosecution witnesses, on specific items of testimony.[14] In addition, defense testimony established the depth of the animosity which several prosecution witnesses harbored against Bryson.[15] Defense

585). On two prior occasions when these witnesses gave testimony about these conversations they totally failed to mention the so-called admissions (R. 562-567; 600).

[14]A defense witness (R. 887-895) established Bryson's absence from San Francisco at a time in 1937 when the Government claimed he had attended Party meetings in that city. Another defense witness (R. 909-910), himself a former Party member who attended the Party meetings at which a Government witness had placed Bryson in 1937, denied that Bryson was present. The Government witness was further impeached by the defense (R. 851). Another defense witness (R. 828-843) introduced records to show that Bryson was in Washington on union business in 1946 at a time when a Government witness quoted him as making "pro-Communist statements" in San Francisco. (See, also, R. 911-917.) Defense witnesses who were present (R. 750; 985) denied that petitioner made the "I am proud of it" statements in July of 1951. The organizer of the rival union swore that these statements were never reported to him, although such evidence would have been of inestimable value at the time and the Government witnesses knew this (R. 929-951). An employer bargaining representative called by the defense (R. 805) denied the existence of a labor dispute which a Government witness had said was the occasion of a Communist meeting attended by petitioner. A defense witness denied the existence of inter-union rivalry as early as 1947 (R. 924-925), the time when a Government witness had said petitioner spoke of such rivalry as the reason for possibly having to execute the Taft-Hartley affidavit.

[15]Government witnesses had publicly expressed their intention to procure Bryson's arrest and conviction in order to take over his union, event though they had no evidence that he was a Communist (R. 728-745).

witnesses testified to the poor reputation of several of the prosecution witnesses for truth and veracity (R. 793, 920-921), and, contrariwise, to the excellent reputation of Bryson for those important traits of character (R. 793, 820-825, 850, 866-867, 874, 882, 895, 970, 999).[16]

At the conclusion of the entire case, motions for dismissal and for judgment of acquittal were made (R. 1085-b, 1085-G) and denied (R. 1085-DDD). After the jury was instructed and retired to deliberate, it requested a Webster's Dictionary (R. 1170). The trial judge summoned the jury back into court, where the following transpired:

> "The Foreman. Your Honor, the words 'affiliation' and 'member' are two words we were having difficulty with, some members of the jury, and we realize we have your note on that—
>
> The Court. You have the instructions on that subject.
>
> The Foreman. We have the instructions on that but they seem, some of them seem to feel there should be an elaboration on those two terms" (R. 1171).

The request for the dictionary was denied and no elaboration of "affiliation" or "member" was given. The following day, the jury returned a verdict of not guilty on the

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[16] Among those who so vouched for petitioner were ordinary seamen, a restaurateur, an important labor leader, the minister of one of the largest Negro churches in San Francisco. The record further reveals that to assist the probation officer in making his report, some "70 or 80 citizens in all walks of life, including two who are professors at universities and deans at colleges" urged that probation be granted, based upon their knowledge of and experience with petitioner (R. 6/14/55, pp. 2-4). The record also reveals Bryson to be a family man, presently making his living as a real estate salesman (R. 922-923).

"membership" count and of guilty on the "affiliation" count (R. 1182).

Before discharging the jury, the trial judge directed its members not to communicate with any person concerning the case and enjoined all persons from communicating with the jurors (R. 1180-1181). A motion to be relieved of the effect of this injunction was made (R. 1191) and denied (R. 1218) although it was shown that, despite the prohibition, some jurors had expressed to the public press lack of certainty about the meaning of the term "affiliation" (R. 1218). Motions in arrest of judgment, for judgment of acquittal and for a new trial were made and denied (R. 6/14/55, p. 1). Judgment and the maximum sentence of five years imprisonment and a $10,000 fine were thereupon imposed (R. 6/14/55, pp. 16-17). Notices of appeal were timely filed (R. 6/14/55, p. 17).

Although the Government conceded (R. 6/14/55, p. 19), and the trial court found (R. 6/14/55, p. 35), the existence of a substantial question on appeal, bail was initially fixed at $50,000, an amount which petitioner was unable to raise. A panel of the Court of Appeals later reduced bail (223 F.2d 775; App. 23-28).

Another panel of the Court of Appeals[17] affirmed the judgment on November 30, 1956, and on April 12, 1957 denied a petition for rehearing with a further opinion (App. 45-49).

[17] Including two District Judges. Cf. n. 3, *supra*.

SPECIFICATION OF ERRORS TO BE URGED.

The court below erred in holding that:

1. The term "affiliation" as used in Section 9(h) of the Taft-Hartley law was not unconstitutionally applied to petitioner despite the facts that—

(a) neither the affidavit nor the indictment advised petitioner with reasonable certainty of the meaning of the term, contrary to the requirements of the Fifth Amendment;

(b) neither the affidavit nor the indictment warned petitioner that this Court's interpretation of the term in *American Communications Association v. Douds*, 339 U.S. 382, was not regarded by the Government as binding;

(c) neither the proof nor the charge complied with the requirements set forth in *American Communications Association v. Douds, supra.*

2. The trial court's instruction on "affiliation" was correct despite the fact that the instruction—

(a) defined the term in a manner contrary to this Court's decision in *Bridges v. Wixon*, 326 U.S. 135;

(b) failed to provide the jury with any legal standards by which to determine what was meant by the term;

(c) permitted the jury to convict petitioner solely upon the basis of activities protected by the First Amendment.

3. The conviction was supported by proper and competent evidence.

4. Prejudicial hearsay testimony respecting Communist Party "policy", received against petitioner, was not contrary to the rules of evidence and prior decisions of this Court.

5. The perjury rule is not applicable to a prosecution for false swearing under 18 U.S.C.A. 1001.

6. Petitioner did not have the right to interview members of the jury after the verdict in order to determine whether extraneous influences affected their understanding of the term "affiliation" and thereby unlawfully influenced the verdict.

REASONS FOR GRANTING THE WRIT.

This is the first case to come before this Court in which the "affiliation" provision of Section 9(h) alone is involved. How this term of "dubious scope" (Mr. Justice Frankfurter concurring in *American Communications Association v. Douds*, 339 U.S. 382, at 420, n. 2) actually was applied in a criminal case is a problem of first impression in this Court.

This case also presents other important questions relating to the administration of Section 9(h) presented but not decided in *Gold v. United States*, 352 U.S. 985[18] and

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[18] In *Gold*, the petition (No. 137, October Term 1956) presented, *inter alia*, these questions which are involved in or analogous to those at bar:

"1. Whether falsity of the 'membership' portion of the affidavit . . . is, or constitutionally can be, established by proof of membership in the Communist Party terminated before execution of the affidavit . . .

"2. Whether falsity of the 'support' portion of the affidavit is, or constitutionally can be, established without

Jencks v. United States, 226 F.2d 540, 553 (5 Cir.), cert. granted, 350 U.S. 980.[19]

any proof that the support was of an organization's advocacy of forcible overthrow of the government.

"3. Whether petitioner was convicted under an unconstitutional construction and application of Section 9(h).

"4. Whether the perjury rules of evidence must be applied to a prosecution for filing a false affidavit under Section 9(h).

"5. Whether the trial court erroneously instructed the jury on the meaning of membership and support in Section 9(h) . . .

* * *

"7. Whether the conviction is supported by evidence . . .

* * *"

When the Court, reversing on other grounds, failed to decide these questions, Mr. Justice Clark dissented, saying:

"It seems to me that proper judicial administration requires this Court to decide these important issues, particularly since they will arise again at the retrial. Furthermore, similar cases involving the same legal points are pending in various districts throughout the country" (352 U.S. at 986).

This is one of those similar cases to which Mr. Justice Clark referred.

[19]The *Jencks* petition (No. 23, October Term, 1956) presented, *inter alia*, the following question, specifically accepted by this Court for review (350 U.S. 980):

"Whether the trial court's instructions on the issue of affiliation,

(a) defined affiliation in a manner contrary to that decided by this Court in *Bridges v. Wixon*, 326 U.S. 135;

(b) provided the jury with a wholly confusing and misleading charge and failed to furnish it a useable legal yardstick in that the instruction both equated membership and affiliation and differentiated the two;

(c) applied the statute in such a way that it afforded no ascertainable standard of guilt, and abridged First Amendment liberties."

In a memorandum submitted at the request of the court after argument in *Jencks*, the Government urged that even if the case could be decided on narrower grounds, "the remaining questions should be decided", not only to give "guidance" in the event of a retrial, but because "such guidance will also be useful at other trials in which questions comparable to those raised here may be presented" (Supplemental Memorandum for the United States, *Jencks v. United States*, No. 23, October Term, 1956, p. 9).

The instant case presents the comparable questions to which the Government there alluded.

Other questions relating to the administration of criminal justice in the federal courts—the reliance upon past membership to prove present affiliation, the applicability of the perjury rule to a false swearing statute, the receipt of hearsay evidence to fasten Party policy upon petitioner, the prohibition against post-verdict inquiry to determine how the jury arrived at its verdict—are also important and require supervisory review by this Court.

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1. **THE TERM "AFFILIATION" WAS UNCONSTITUTIONALLY APPLIED TO PETITIONER HERE. (Questions 1, 2, and 3.)**

While *American Communications Association v. Douds*, 339 U.S. 382,[20] held that the term "affiliation" as there construed was not unconstitutionally vague for the purposes of a civil suit,[21] it is clear that the opinion does not foreclose inquiry into the manner in which the term is construed and applied in any given criminal case.[22] *Douds*

[20] Only Chief Justice Vinson and Justices Reed and Burton joined in the "opinion of the Court" in that case. Justice Frankfurter was of the view that "Congress has cast its net too indiscriminately" (339 U.S. at 419) and Justice Jackson appeared to harbor the same doubts (339 U.S. at 433, *et seq.*). Justice Black dissented, and Justices Douglas, Clark and Minton did not participate.

[21] In *Douds* the affidavit was considered in the context of civil actions relating to Board proceedings (339 U.S. at 386). Here the affidavit is the basis of a criminal prosecution and is therefore presented in quite a different light.

[22] Because of the lack of precision of the term, the Chief Justice recognized that there could be "circumstances" in which its use might render even the statute "unconstitutionally vague and indefinite" (339 U.S. at 413).

As to the difficulties which other judges have had with the same term, see (1) Judge Learned Hand in *Tolsky v. Wilson* (S.D. N.Y. 1920) cited in *Bridges v. Wixon*, 144 F.2d 927, 941, n. 1 (9 Cir.): "As to affiliation the case is not so clear, and depends upon how one

sustained the constitutionality of the statute because Congress found that the Communist Party sought to utilize union leadership to foment political strikes and because this Court thought it a reasonable inference that persons whose "affiliation"[23] with the Party could be established by "overt acts" would be likely to "engage in political strikes and other forms of direct action". Certainly there was no suggestion in this Court's opinion (or indeed in the statute) that persons who had long since terminated their associations with the Communist Party, or who had been supporters of the Progressive Party were to be regarded as affiliated with the Communist Party within the meaning of the statute. This construction of the statute, necessary to sustain it against the requirements of the First, Fifth and Sixth Amendments, was ignored here.

A. The affidavit gave petitioner no notice that the word "affiliation" as used therein covered the activities of which he was here convicted.

Nowhere in the affidavit was petitioner advised that the Board was disregarding this Court's gloss upon the statute. The affidavit gave petitioner no indication that the term was being used therein in any wider or different

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defines that word." (2) Judge Chase in *United States v. Reimer*, 79 F.2d 315, 317 (2 Cir.): Definition "is * * * impossible * * *". (3) Judge Major in *Inland Steel Co. v. National Labor Relations Board*, 170 F.2d 247, 262 (7 Cir.): "Its meaning would be quite beyond the reach of the ordinary citizen."

[23] While the Chief Justice's opinion in *Douds* did not mention *Bridges v. Wixon*, 326 U.S. 135, there was nothing in it to suggest that the *Wixon* definition of affiliation had been overruled. In the earlier case this Court emphasized that to make out affiliation the "act or acts . . . must be of that quality which indicates an adherence to or a furtherance of the purposes or objectives of the proscribed organization as distinguished from mere cooperation with it in lawful activities" (326 U.S. at 143).

sense than that which could be derived from a reading of *Douds:* Petitioner contends that once this Court has construed a statute, a citizen may rely upon its construction and assume that it becomes part of the statute and of all forms and affidavits which are utilized in connection therewith; a citizen has a right to assume that if he takes an oath, understanding a term therein to mean what this Court has said it means, he will not be prosecuted for false swearing.

Certainly, nothing in the affidavit put petitioner on notice that his long-past association with the Communist Party or his 1948 support of the Wallace candidacy would make his 1951 oath false. He was given no warning that his honest belief that such conduct did not constitute affiliation would not be determinative of the issue. He was not advised that he would be guilty of false swearing if the Government or a District Judge or jury understood the term differently. Petitioner could not be required to forswear an undefined "affiliation" and then be convicted of false swearing because others had a different comprehension of the term's meaning than he had. No matter how others may have viewed his past associations with the Communist Party or his 1948 support of Wallace, he could still, in the absence of a warning to the contrary, have entertained the "honest, untainted" belief (339 U.S. at 413) that he was not affiliated in 1951. The absence of anything in the affidavit to warn him to the contrary made of the affidavit a trap which four years later was closed on him by a verdict based upon some one else's different understanding of the words used. This is clearly an unconstitutional application of the statute to petitioner.

B. The indictment did not advise petitioner of the crime charged with sufficient certainty to permit him to make his defense.

The indictment, like the affidavit did not carry any statement of the facts and circumstances comprehended by the term "affiliation". It did not advise petitioner whether the term meant what this Court said it meant in *Douds*, or whether it meant the conduct and activity which this record now shows to have been the basis for the conviction. The indictment was therefore fatally defective and violative of the Sixth Amendment. *United States v. Hess*, 124 U.S. 483; *United States v. Cruikshank*, 92 U.S. 542. That the indictment was cast in the language of the statute does not cure the defect where, as here, the statutory language does not "fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense . . ." (*United States v. Carll*, 105 U.S. 611, 613). An indictment which alleges only that petitioner was "affiliated" with the Communist Party, without setting forth the overt acts upon which the pleader's conclusion is based, is totally insufficient.[24]

C. The evidence upon which petitioner's conviction rests manifests the unconstitutional application of the statute here.

It is undisputed that the evidence of petifioner's active participation in Communist Party affairs terminated with the year 1947—four years before he signed the affidavit.

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[24]Petitioner sought to have the indictment clarified by pretrial discovery motions. If the Government had complied with Judge Morris' order (App. 9-11), it would have been required to advise petitioner, as requested in his motion for particulars, of "each and every overt act performed by the defendant which allegedly resulted in a relationship of affiliation with the Communist Party . . ." (Clerk's Transcript on Appeal; Motion for Bill of Particulars, *United States v. Bryson* [D.C. D.C. Crim. No. 1618-53]).

The only evidence subsequent to that date has to do with support of the Progressive Party in 1948 and the alleged post-affidavit admissions. None of this is enough to make out a constitutional application of the statute to petitioner. Nor does the evidence of alleged Party policy in 1947 justify a different result.

In order to sustain a conviction for false swearing it is clear that the Government must prove that petitioner did not entertain the honest belief in 1951 that he was not affiliated with the Party. It must establish the falsity of his oath by proof of overt acts showing his state of mind at the time he took the oath. This the evidence fails to do.

To suggest that four year old evidence of Party activity demonstrates the falsity of petitioner's 1951 oath, is to urge upon the Court a "presumption of continuity" which is so irrational and arbitrary as to amount to a denial of due process. *Maggio v. Zietz*, 333 U.S. 56; cf. *Schware v. Board of Bar Examiners*, ... U.S. ....., 25 Law Week 4276, 4280; *Konigsberg v. State Bar*, ... U.S. ....., 25 Law Week 4281, 4286; cf. *Wolf v. United States* 259 F. 388 (8 Cir.) Furthermore, it is to disregard the *caveat* of Chief Justice Vinson that the statute "is intended to prevent future action rather than to punish past action" (339 U.S. at 414).

Reliance upon petitioner's past associations with the Communist Party to establish "affiliation" of no avail for the additional reason that there is no evidence that those associations comprehended an unlawful purpose. During the period covered by this record, the Party was a "recognized political party in the State of California" (*Konigsberg v. State Bar*, ... U.S. ....., 25 Law Week 4281, at

42[26]),[27] and even if petitioner were a member at that time, this cannot be taken as proof that then or later his connection was for any unlawful purpose. (Cf. *Langer v. United States*, 76 F.2d 817 [8 Cir.]). Thus the evidence (as well as the charge [*infra*]) cannot be said to meet the test of *Bridges v. Wixon*, 326 U.S. 135.

The court below, recognizing the necessity of proof of *present* affiliation goes to great lengths "to explain the absence of evidence of Bryson's active participation in Party functions after 1947, a deficiency which, [it concedes], . . . might be taken to indicate that Bryson had severed his connections with the Party" (238 F.2d 661; App. 35).

To do this it relies upon a scrap of hearsay testimony that in 1947 the Party adopted a "policy" that its trade union members would resign from the Party but would keep in "close touch and alliance" with it (238 F.2d 660; App. 31).[28] This Party policy is held to bind petitioner without any evidence that he concurred in it,[29] and is used

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[26] Cf. *Communist Party v. Peck*, 20 Cal.2d 586 (1942).

[27] The court's opinion neglects to mention that the Government witness had said that the resignations would be made "*so they could comply*" (R. 503). Apparently if there was a Party policy, it was adopted in reliance upon Chief Justice Vinson's observation that there was no one who might not by "a voluntary alteration of the royalties which impel him to action" become eligible to sign the affidavit (339 U.S. at 414).

[28] The entire evidence respecting what Bryson is alleged to have said in connection with this matter is as follows:

"A. He said that he was being faced with a terrific struggle on the waterfront with Harry Bundeberg of the SUP.

Q. Did he say anything further, sir?

A. And that he saw no present need for complying with the provisions of the Taft-Hartley Act.

Q. Did he say anything further, sir?

to explain the "absence of evidence" which otherwise might be taken to indicate that he had "severed his connections with the Party".

The glaring deficiency of this "evidence" upon which the court below so heavily relied is the total lack of corroborative support for it in the record. For if petitioner did indeed resign in name only, and if he had indeed kept in "close touch and alliance" with the Party thereafter, it is to be expected that the record would contain at least one scrap of evidence that he had done so. In the four years which followed the promulgation of this alleged policy and which preceded petitioner's execution of the affidavit, one might reasonably have expected at least one shred of evidence that once at least he had been in touch with a Party official or had attended a Party meeting or had contributed money to the Party or had subscribed to a Party periodical or had expressed views which were sympathetic to or even parallel with those of the Party. One may ask, rhetorically, what kind of "close touch and alliance" it is which over a period of four years is totally devoid of any evidence of relationships or contacts? What kind of "affiliation" is it which, as the court below was compelled to admit on denying a rehearing, is "not manifested by activity"? (..... F.2d .....; App. 48).[28]

A. But at a later date it may prove necessary to file an affidavit.

Q. Do you recall anything further that he said?

A. Not what Mr. Bryson said, no." (R. 503.)

[28] Although the Government and not petitioner had the burden of proof on the issue, it is significant to observe that it was petitioner who established from the testimony of the "agent in charge" the existence of undercover agents in the waterfront section of the Communist Party in San Francisco both before and after 1947 and up to and including the time petitioner executed the affidavit (R.

For the same reasons, and even more compellingly, the evidence of petitioner's 1948 support of the Progressive Party does not make false his 1951 oath of non-affiliation with the Communist Party. Indeed, if the statute is now to be construed (contrary to the construction given it in *Douds*) so as to permit such a result, it clearly runs afoul of the First Amendment. *Schneiderman v. United States*, 321 U.S. 18; cf. *DeJonge v. Oregon*, 299 U.S. 351; *Herndon v. Lowry*, 301 U.S. 242.

The alleged 1951 admissions are of no avail to bolster this incredible case, not only because of the inherent improbability of their having been made under the circumstances related,[29] but because they lack the necessary corroboration. Cf. *Opper v. United States*, 348 U.S. 84; *Smith v. United States*, 348 U.S. 1. The court below believed it found this corroboration in the pre-1951 evidence (238 F.2d 662; App. 38). For the reasons already stated, that evidence could not, by any standards, tend to establish the commission of the offense in 1951 or in any way support the alleged after-the-fact admission.

The evidence of affiliation in 1951 was literally non-existent. It cannot properly even be dignified by calling it circumstantial; but even if it could, the circumstances were at the very least as consistent with an honest belief of non-affiliation as with the reverse. These scraps and tatters of evidence do not support the Government's heavy

1032-1034). The Government, however, called no one to testify that during the four years preceding the execution of the affidavit, Bryson had any connection whatsoever, in any shape, manner or form, with the Communist Party. This is evidence of "the most convincing character" that no such evidence existed. *Interstate Circuit v. United States*, 306 U.S. 208, 226.

[29] *Supra*, pp. 10, 11, notes 13 and 14.

burden of proof that petitioner swore falsely in 1951, and the inference which the jury was asked to draw therefrom was so arbitrary as to deprive him of due process of law.

D. The charge to the jury contained an unconstitutional application of the term "affiliation" to petitioner.

Long before *Douds* was decided, this Court made it clear that affiliation meant association for an unlawful purpose as distinguished from cooperation in mere lawful activities. *Bridges v. Wixon*, 326 U.S. 135. Such a distinction appears to be necessary here to avoid serious constitutional questions under the First Amendment. Yet in its charge the court nowhere explained this distinction to the jury. The jury was therefore free to convict petitioner even though it found from the evidence that at no time had he ever associated himself with the Communist Party in pursuance of any unlawful objectives.[30]

In view of the total lack of evidence that petitioner's association with the Communist Party was for illegal purposes, he was entitled to a charge which advised the jury that under those circumstances he was not, as a matter of law affiliated with the Communist Party. At the very least he was entitled to a charge that before he could be found to have been "affiliated", it was necessary that the jury find that his connections with the Party were for the purpose of advancing its unlawful objectives. He was entitled to have the jury know that if it found his cooperation with

[30] Indeed, the record is devoid of any evidence relating to the objectives of the Communist Party, and the Government deliberately rejected an invitation that the trial court take "judicial notice" of the nature and character of that organization (R. 900-F-G; 1008-G-H; 1085-I-K).

the Party to have been merely in lawful activities, it might acquit him.

The failure of the charge in this respect gave to Section 9(h) so broad a sweep as to embrace areas clearly protected by the First Amendment, and furthermore made the statute as here applied so vague and indefinite as to violate the Fifth Amendment.[31]

In addition, the charge was hopelessly confusing. It equated affiliation with membership in "all but name"; it told the jury to consider "any statements made or acts done by the accused", presumably at any time, to determine if he were affiliated; it told the jury to consider the "facts and circumstances" which it had previously said were relevant on the membership issue to aid in determin-

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[31] The court below recognized that a charge cast in the language of *Bridges v. Wixon* would have been "correct as a matter of law". But took the view that petitioner was precluded from raising the point because it claimed he had not preserved it on the trial (238 F.2d at 664; App. 41-42). The fact of the matter is that throughout the trial petitioner's counsel urged the *Wixon* case upon the court (see, e.g., R. 1085-T-V; 1085-PP-SS; 1085-ZZ-AAA; 719-L; 719-T; 719-RRR-SSS; 719-FFFF; 1127-1129). Indeed, the instruction *so far as it went* came almost verbatim out of the *Wixon* opinion. The trial judge must consciously have chosen to make no reference to illegality of purpose because there was no evidence in the record upon which he could have based such an instruction.

In any case, F.R.Crim.P. 52(b) will not permit such a "plain error" to stand in a case of this significance. *Clyatt v. United States*, 197 U.S. 207; *Brasfield v. United States*, 272 U.S. 448; *Screws v. United States*, 325 U.S. 91, 107; *Ruther v. United States*, 120 F.2d 968 (10 Cir.); *United States v. Raub*, 177 F.2d 312 (7 Cir.); *United States v. Cumberland*, 200 F.2d 609 (3 Cir.); *United States v. Sherman*, 200 F.2d 880 (2 Cir.); *Payton v. United States*, 222 F.2d 794 (D.C. Cir.); *Barfield v. United States*, 229 F.2d 936 (5 Cir.); *United States v. O'Connor*, 237 F.2d 666 (2 Cir.); *Woelfel v. United States*, 237 F.2d 484 (4 Cir.).

ing the affiliation issue (R. 1138-P-Q).[32] This charge is not only confusing and self-contradictory (cf. *Bollenbach v. United States*, 326 U.S. 607; *Barfield v. United States*, 229 F.2d 936 [5 Cir.]), but, by permitting the jury to rely upon pre-affidavit evidence without advising it of the possibility of the *locus penitentiae*, is directly contrary to the construction put upon the statute by this Court in *Douds*.

All of the foregoing demonstrates that as applied here, the term "affiliated" was given a limitless scope which embraced among other things cooperation in activities protected by the First Amendment. Furthermore, in neither the pleadings, the evidence, nor the charge was the term given anything approaching an ascertainable standard of guilt as required by the Fifth Amendment and as spelled out in both *American Communications Association v.*

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[32]That the jury was in fact confused is seen not only by its later request for "elaboration" (*supra*, p. 12) and the post-verdict statements of two of the jurors (*infra*, p. 36), but by the fact that during its deliberations the jury did not know whether the terms "membership" and "affiliation" were the same or different. A note was handed up to the court requesting a black board (R. 1171); on the reverse side of that note, the original of which is in the Clerk's Transcript on file herein, appears a poll, apparently taken by the jury, as follows:

"Affiliated and member: same
different
same
same
different
same
different
different
same
different
different
different"

Douds, 339 U.S. 382, and *Bridges v. Wixon*, 326 U.S. 135. In affirming the judgment of conviction upon such a record, the court below has not only decided the case in a manner contrary to the decisions of this Court in those cases, but has permitted to stand a judgment resting upon the verdict of a jury which was left to roam at large through the evidence without adequate legal guidance. The jury was thus permitted to trespass upon First Amendment liberties; if indeed it could have known from the instructions just what it was doing.

To correct these glaring errors in this case of first impression, and one which has obvious importance to the future administration of Section 9(h), the writ should be granted and the case reviewed by this Court.

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2. **PREJUDICIAL HEARSAY TESTIMONY WAS ERRONEOUSLY RECEIVED AGAINST PETITIONER CONTRARY TO THE DECISIONS OF THIS COURT. (Question 4.)**

We have already adverted to the receipt of hearsay testimony concerning statements of Communist Party policy allegedly made in 1947 by the "trade union director of the Communist Party". Admittedly such hearsay testimony —without which the Government had no conceivable case against petitioner—was highly damaging to him and unless justified by an exception to the normal rule of exclusion, should not have been received. *Morris' Lessee v. Vanderen*, 1 Dall. 64; *Scott v. Radcliffe*, 5 Pet. 81; *Gaines v. Reif*, 12 How. 472; *Hopt v. Utah*, 110 U.S. 574; *Clement v. Packer*, 125 U.S. 309; *Donnelly v. United States*, 228 U.S. 243; *Llewellyn v. Electric Reduction Co.*, 275 U.S. 243; *Glasser v. United States*, 315 U.S. 60.

Petitioner was not confronted with this so-called trade union director and had no opportunity to cross-examine him. A conviction predicated upon such testimony presents serious questions of a denial of due process of law. 5 Wigmore *Evidence*, 3d ed., § 1397.

The court below sought to justify the use of this evidence against petitioner on one of two theories: "testimonial completeness" and the so-called "state of mind exception" to the hearsay rule—only in this case the state of mind involved was admittedly not that of petitioner but that of the Communist Party (238 F.2d 661; App. 34-35).[33] Neither theory justifies the use of this evidence against petitioner, evidence without which the conviction cannot stand.

The theory of testimonial completeness is predicated upon the proposition that petitioner was "replying" to the trade union director. However, as we have seen,[34] the record does not support this contention. Indeed, the record is clear that while the Government perhaps expected its witness to testify that Bryson "replied" to something that had been said, no such testimony was ever produced.[35] Bryson's statement that "he saw no present

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[33] In its opinion on rehearing the court below seems to rest its holding exclusively upon the "testimonial completeness" theory, erroneously asserting that petitioner makes no objection to that holding (____ F.2d ____; App. 49).

[34] *Supra*, n. 27.

[35] When the prosecuting attorney first offered the hearsay statement objection was sustained because, as the trial court observed, "* * * I don't suppose any of us would want to be held bound by everything that everybody says in our presence. I don't know how we could protect ourselves if we did." (R. 501; see also R. 491.)

The prosecutor then promised that the evidence would show that petitioner "made a statement by himself that incorporated

[1947] need for complying . . . but at a later date it may prove necessary to file an affidavit." (R. 503), is no evidence that he adopted what the trade union director said, and does not justify the use of the damaging hearsay testimony against him. In any case there cannot be distilled from this entire incident in 1947 an intention to file false affidavits in 1951. The purpose was to leave the Party "so that they could comply" (R. 503; see n. 26, *supra*) not to file false affidavits.

Beaver v. Taylor, 68 U.S. 637, cited by the court below, is clearly not in point. The issue in that civil action was whether plaintiffs had paid taxes in certain years. Letters and account books dealing with the years in question and kept in the regular course of business by a clerk who was proven dead at the time of the trial were held admissible. This is a far cry from what happened her. In the first place, oral declarations do not stand on the same footing of trustworthiness as written records kept in the regular course of business; secondly, there was no proof here of the unavailability of the hearsay declarant; thirdly, the books and records in the *Beaver* case dealt with the very period in question, whereas here the oral hearsay deals with a period four years remote in point of time.

The ultimate issue at bar was Bryson's state of mind in 1951, when he signed the affidavit, not, as the court below apparently thought, his or the Party's state of mind in 1947. Whatever petitioner's intention was in the earlier year, he could not have been convicted unless he had guilty

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a substantial part and showed an understanding of what had been said" (R. 501-502). As we have seen, *supra*, n. 27, this promise was never kept; nevertheless, the court reversed itself and permitted the hearsay testimony to be received.

knowledge in 1951. This is basic to the statute. The fact that it was constantly overlooked by the court below in its holding if not in its opinions, is what led the court into the myriad errors which it made.

The court below held that the hearsay testimony was admissible upon the alternative ground that it showed the Party's "state of mind" (238 F.2d 661; App. 35). Of course, it is petitioner's state of mind, and his alone, which is relevant to this case. In addition to completely ignoring once again the four year time gap, the position of the court below has the vice of assuming that which is sought to be proved: that Bryson was affiliated with the Party. For clearly, if he were not, Party policy would be totally irrelevant. To put it another way: the only manner in which Party policy can be relevant is if there is proof (or an assumption) of "affiliation".[26] To argue as the court below does is to indulge in circular reasoning and is literally to lift oneself by one's bootstraps.

The cases which the court below cites in this connection are totally inapposite. *Mutual Life Insurance Co. v. Hillmon*, 145 U.S. 285, was a civil case in which the fact at issue was the presence of a person at a specified place on March 8, 1879. Letters *he* had written on March 1st and March 5th—*two to two and a half weeks earlier*—indicating his intention to go to that place, were held to be admissible. Nothing was said in the opinion to indicate that

[26] We assume for the sake of argument that the status of affiliation" would be enough to fasten upon a defendant the "policy" expressed by a Party spokesman. This, of course, is highly doubtful. Cf. *Schneiderman v. United States*, 320 U.S. 118; *Wieman v. Updegraf*, 344 U.S. 183; *Konigsberg v. State Bar*, ___ U.S. ___, 25 Law Week 4281.

a statement of *some other person* made *four years prior* to the critical date, would be admissible in a *criminal* case. *Mattox v. News Syndicate Co.*, 176 F.2d 897 (2 Cir.), dealt only with a special rule of evidence in civil libel cases and contains no intimation that hearsay such as was here received would be admissible in a criminal proceeding.

The fact that in other Taft-Hartley cases similar evidence was admitted (238 F. 2d 661; App. 35) becomes irrelevant upon an analysis of those cases. In none of them, as distinguished from this one, was there a four year gap between the last association with the Party and the execution of the affidavit. In each of them there was some evidence (we do not comment upon its weight) to connect the defendant with the Party "during the critical period" (*Fisher v. United States*, 231 F.2d 99, 103 [9 Cir.]; cf. *Hupman v. United States*, 219 F.2d 243, 247 [6 Cir.]; *Jencks v. United States*, 226 F.2d 540, 544 [5 Cir.]).

This hearsay testimony was vital to the Government's case since it was the "explanation" for the "absence of evidence" against petitioner during the critical period (238 F.2d 661; App. 35). By sanctioning its admission contrary to the rules of evidence and the decisions of this Court cited above (p. 28), the court below has permitted such a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory power over the inferior federal judiciary.

3. THE PERJURY RULE IS APPLICABLE AND WAS NOT COMPLIED WITH HERE. (Question 5.)

This question was left specifically undecided in *Gold v. United States*, 352 U.S. 985; see *supra*, n. 18, and is again presented in this case because it is clear from the facts that the evidence here does not satisfy the requirements of the perjury rule and because the record shows that the jury was instructed, contrary to the rule, that it could convict upon circumstantial evidence alone (R. 1138-O-Q).

The perjury rule, of ancient origin (7 Wigmore, *Evidence*, 3d ed., §§ 2030-2044) yet retaining its vitality into modern times (*Weiler v. United States*, 323 U.S. 606), requires that before there can be a conviction for perjury (and this applies to false swearing under 18 U.S.C.A. 1001) there must be either the *direct* evidence of two witnesses or the *direct* evidence of a single corroborated witness to the falsity of the oath. *United States v. Wood*, 14 Pet. 430; *Hammer v. United States*, 271 U.S. 620; *Weiler v. United States*, 323 U.S. 606.

The rule applies to any case in which the issue is the falsity of an oath, whether denominated perjury or not. *United States v. Wood, supra; Hammer v. United States, supra; United States v. Isaacson*, 59 F.2d 966 (2 Cir.); and see the state cases collected in Wigmore, *op. cit.*, § 2042, n. 9. In the present case the gravamen of the offense was the execution and use of a false affidavit, i.e., a false oath. Therefore, even though 18 U.S.C.A. 1001 may in some situations punish false statements not under oath, this case presents the classic situation of "oath against oath" and

there is every reason why the perjury rule should apply here.[37]

The direct evidence which is required to satisfy the rule is sharply distinguished from circumstantial evidence. The latter will not suffice to prove the falsity of an oath. *United States v. Nessanbaum*, 205 F.2d 93 (3 Cir.); *Spaeth v. United States*, 218 F.2d 361 (6 Cir.). To prove the falsity of an oath, the evidence must be "strong, clear, convincing and direct" (*United States v. Neff*, 212 F.2d 297, 307 [3 Cir.]), and must establish "the fact to be proved without the necessity for . . . inference" (*Radomsky v. United States*, 180 F.2d 781, 783 [9 Cir.]).

It is clear that the evidence here does not meet these tests. Affiliation with the Communist Party is an objective fact which is capable of being proved by direct evidence. The court below so recognized in its opinion on the denial of rehearing (..... F.2d .....; App. 48), as did this Court in *Douds* (339 U.S. at 410). In this respect at least, affiliation can be proved as objectively as membership. Cf. *United States v. Remington*, 191 F.2d 246 (2 Cir.), cert. den. 343 U.S. 907; *Bridges v. United States*, 199 F.2d 811, (9 Cir.), reversed on other grounds 346 U.S. 209. Affiliation may be proved by direct evidence showing financial assistance, contributions of time or energy, sustained cooperation, etc.—all to further an illegal objective (*Bridges*

[37] Indeed, in the *Douds* case the concurring Justices referred to the crime as "perjury" (339 U.S. 420, 436); and while the Chief Justice called it "false swearing" (*ibid.*, at 411) rather than "perjury", there is no intimation in his opinion that the falsity of an oath was not the gist of the offense. A reading of the whole of his opinion indicates that he had no doubts upon the point.

v. Wixon, 326 U.S. 135). Here there was no such direct proof of affiliation in 1951.

The Government's direct evidence consisted only of (1) pre-1947 connections with the Party; (2) hearsay testimony regarding a 1947 policy of the Party to resign in order to comply; (3) activity in support of the Progressive Party in 1948; and (4) uncorroborated post-affidavit "admissions" of membership. But none of this is direct evidence that petitioner's oath that he was not affiliated with the Party in April of 1951 was false. At best it is necessary to "infer" from this evidence that petitioner was affiliated when he swore he was not. We have heretofore stated why we believe that such an inference cannot rationally be drawn. Here, we note that at its strongest the Government's case is an inferential one, i.e., a circumstantial one, and to that extent it cannot withstand the "stringent rule" (*Weiler v. United States*, 323 U.S. 606, 609) required in a false swearing case.

To determine this question of obvious importance for the future administration of Section 9(h) which was left undecided in *Gold v. United States*, 352 U.S. 985, the writ should issue and this Court should review the record.

4. THE REFUSAL OF THE TRIAL COURT, SANCTIONED BY THE COURT BELOW, TO PERMIT INQUIRY OF THE JURY IN ORDER TO ASCERTAIN WHETHER EXTRANEOUS INFLUENCES RESULTED IN ITS VERDICT, IS CONTRARY TO THE DECISIONS OF THIS COURT AND IS A DEPARTURE FROM NORMAL JUDICIAL PRACTICE. (Question 6.)

The trial judge forbade anyone from communicating with any of the jurors for any purpose (R. 1180-1181).[38] Despite this order, a newspaperman communicated with the jurors to ascertain what they understood the word "affiliation" to mean. Two of them were uncertain as to its meaning, saying, "A higher court [will] have to make the final determination of the meaning of 'affiliation' as the word applied to Bryson".[39] Petitioner thereupon moved to be relieved of the order so that he could ascertain whether any extraneous or illegal considerations had entered into the jury's deliberations and whether what was unclear throughout the trial and even after the verdict, had been resolved not be proper, but rather by improper, methods. Such an inquiry petitioner was not permitted to make.

While it is generally true that jurors may not impeach their verdict, this Court has allowed the testimony of jurors to be received to show whether extraneous, illegal or improper considerations entered into their deliberations

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[38]The Government later conceded that there were "some doubts" as to the "propriety" of such an order (R. 1215-1216). Apparently the trial judge later was of the same view, for when his attention was called to its disobedience by a newspaperman, he refused to do anything about it (R. 1219-1221).

[39]See Ex. A, p. 2, to the affidavit of Richard Gladstein in support of Motion To Be Relieved of Court Order Imposing Silence upon Members of the Jury, filed in the court below on June 6, 1955, and included in the Clerk's Record on Appeal here.

and influenced their verdicts. *Mattox v. United States*, 146 U.S. 140;[40] cf. *Holmgren v. United States*, 217 U.S. 507; *Hendrix v. United States*, 219 U.S. 579; *Clark v. United States*, 289 U.S. 1. The cases in the inferior courts in which jurors' affidavits have been received in support of post-verdict motions are countless. See, for example, *Orenberg v. Thecker*, 143 F.2d 375 (D.C. Cir.); *Ryan v. United States*, 191 F.2d 779 (D.C. Cir.); *United States v. Furlong*, 194 F.2d 1 (7 Cir.); *Woollomes v. Heinze*, 198 F.2d 577 (9 Cir.); and *Callanan v. United States*, 223 F.2d 171 (8 Cir.).

Petitioner should not have been denied the right accorded to other litigants of finding out, if he could, whether any extraneous influences operated on the jury in this case. This is particularly so where, as here, enough had already occurred to justify the view that such influences might have been present. In considering whether the erroneous ruling was prejudicial there must be borne in mind these facts: the jury had already expressed its lack of clarity on the meaning of the term "affiliation"; in its deliberations it appeared not to know whether the term meant the same thing as membership or otherwise;[41] and even after the verdict two jurors were still uncertain as to the meaning of their verdict.

All that petitioner sought was an opportunity to ascertain what the facts were. The denial of that opportunity

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[40] In the *Mattox* case this Court adopted as correct the following statement of the rule from the opinion of Mr. Justice Gray in *Woodward v. Leavitt*, 107 Mass. 453: ". . . a juryman may testify to any facts bearing upon the question of the existence of any extraneous influence . . ."

[41] *Supra*, n. 32.

is contrary to the decisions in this Court and in other Circuits, and should be reviewed here.

CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated, San Francisco, California,
June, 1957.

Respectfully submitted,

RICHARD GLADSTEIN,
GEORGE R. ANDERSEN,
NORMAN LEONARD,
Counsel for Petitioner.

(Appendix Follows.)

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Appendix

In the United States District Court for the Northern District of California, Southern Division

No. 33559

United States of America,
Plaintiff,
vs.
Hugh Bryson,
Defendant.

ORDER

Defendant herein has filed a motion to dismiss, a motion to compel election, and a motion for a bill of particulars in relation to an indictment which charges that the defendant "in a matter within the jurisdiction of the National Labor Relations Board, an agency of the United States, did unlawfully and wilfully make, use, and cause to be made, and used a false writing and document, namely an 'Affidavit of Non-Communist Union Officer'—Form (NLRB 1081) knowing the same to contain a false, fictitious and fraudulent statement and representation, to wit: that he was not a member of the Communist Party, whereas the said Hugh Bryson then and there well knew that he was a member of the Communist Party".

The second count is in the same language with the exception of the substitution of the words "affiliated with

the Communist Party" in lieu of "was a member of the Communist Party".

The test to be applied to the sufficiency of an indictment is not to look for mere formal defects and academic distinctions. The test is whether it contains the necessary elements of the offense intended to be charged. *Hagner v. U. S.*, 285 U. S. 427, 431. This indictment clearly apprises the defendant of what he must be prepared to meet.

Upon the authority of the well considered opinion in *U. S. v. Walter C. Lohman, Jr.*, and *U. S. v. Everst Melvin Hupman*, No. 2705 Criminal at Dayton, as yet unreported but copies of which have been submitted, it is ordered that the motion to dismiss be and it is hereby denied.

Finding no merit whatsoever in the motion to compel election, it is denied without further comment.

As to the motion for a Bill of Particulars, Rule 7 F of the Federal Rules of Criminal Procedure provides that "The Court for cause may direct the filing of a bill of particulars". It is urged that the particulars requested would simply require the government to state the overt acts upon which the indictment is based. If this were done, it would in my opinion, force the government to spread before the accused its entire case. Such is not the function of a Bill of Particulars. Accordingly, that motion is also denied. *American Tobacco Co. v. U. S.*, 147 Fed. 2d, 93 (C.A. 6); *Hughes v. U. S.*, 114 Fed. 2d, 285 (C. A. 6).

Dated: June 3, 1953.

Edward P. Murphy
United States District Judge

In the United States District Court, for the Northern District of California, Southern Division

No. 33630

United States of America,
Plaintiff,
vs.
Hugh Bryson,
Defendant.

MEMORANDUM AND ORDER

The defendant is charged in two counts with a violation of 18 U.S.C., 1001 for making and using a false writing and document, namely, an "Affidavit of Non-Communist Union Officer" (Form N.L.R.B. 1081) and mailing the same in San Francisco to the National Labor Relations Board in Washington, D. C., and thereby filing and causing to be filed said affidavit with the National Labor Relations Board in Washington, D. C., knowing the same to contain a false, etc., statement. In Count 1 the alleged false statement is that the defendant was not a member of the Communist Party, and in Count 2 the alleged false statement is that the defendant was not affiliated with the Communist Party.

The substance of the challenges made to the present indictment was made before Judge Murphy on the hearing of the motions made by the defendant in the case of United

States v. Eryson, Criminal No. 33559, and they were decided adversely to the defendant. The present indictment is simply a corrective indictment and differs from No. 33559 only in respect to the allegations of mailing in this District for the purpose of more clearly establishing venue in this District. These allegations do not change the basic theory of the indictment and, therefore, the ruling of Judge Murphy should be adhered to for the reasons set forth in his Order in No. 33559.

The challenge of the defendant to the venue of this action does raise a problem to which this court should give careful attention. The indictment pleads that the alleged false document was mailed or caused to be mailed by the defendant in the City and County of San Francisco, State of California, and within the Northern District of California, to the National Labor Relations Board in Washington, D. C. Section 159(h) of Title 29, U.S.C. requires the filing of the so-called non-communist affidavit with the Board by the officers of a labor organization seeking the benefits of the Labor Management Relations Act. The officer is required to state that ". . . he is not a member of the Communist Party or affiliated with such party, . . ." Title 18 U.S.C., Section 1001 provides:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Paragraph VII of the Motion to Dismiss alleges:

> "There is no venue in the Northern District of California in that the indictment charges that the defendant filed and caused to be filed the alleged false writing and document with the National Labor Relations Board, an agency of the United States, in Washington, D. C., and not in this district."

The government relies on 18 U.S.C. Section 3237 to meet this challenge. That Section provides:

> "Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.
>
> "Any offense involving the use of the mails, or transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matter moves."

It is the position of the government that the Indictment alleging mailing of the alleged false affidavit in the Northern District of California and filing in the District of Columbia is sufficient to bring venue in the former District and to invoke the venue provisions of Section 3237. Research does not disclose any cases directly construing the applicability of Section 3237 to Section 1001, but under old Section 80, the predecessor to Section 1001, the court said that there was venue in both the District of mailing and the District of filing. *United States v. Eisler*, 75 F. Supp. 634. In other actions not related to Section 1001 it has

been held that the District where the mailing took place has venue. *Bridgeman v. United States*, 140 Fed. 577 (1905); *United States v. Downey*, 257 Fed. 366 (1919); *In re Pollissier*, 136 U.S. 257 (1890); *United States v. Lombardo*, 241 U.S. 73 (1915).

The import of Section 3237 and the cases above cited seem to support the contention of the government. Therefore, as a matter of pleading the court must rule that the Motion to Dismiss on the ground of improper venue is not well taken. However, since this is a problem of pleading, and since the conclusion reached is not free from question as a matter of pleading without consideration of the problem of proof, the court should point out that the problem would not be present if the indictment was returned in the district in which the alleged false affidavit was filed. It is only necessary to point to the recent case of *Bridges v. United States*, 346 U.S. 209, to illustrate the point.

It Is Therefore Ordered that the Motions of the defendant to:

1. Dismiss the Indictment,
2. Compel Election, and
3. For a Bill of Particulars

are, and each of them is, hereby denied.

Dated, August 14, 1953.

Oliver J. Carter,
United States District Judge.

In the United States District Court for the Northern District of California, Southern Division

United States of America, Plaintiff, vs. Hugh Bryson, Defendant.	No. 33630
United States of America, Plaintiff, vs. Hugh Bryson, Defendant.	No. 33559

ORDER GRANTING LEAVE TO DISMISS INDICTMENTS

Rule 48(a) F.R.C.P.

The United States Attorney, at the direction of the Attorney General, seeks leave of court to file dismissals of the indictments in these cases. Rule 48(a) F.R.C.P. An indictment charging the same offense against the defendant is now pending in the United States District Court for the District of Columbia.

It has become the duty of the Attorney General to determine in which jurisdiction the offense charged "was probably committed and bring the offender to trial there." *Haas v. Henkel*, (1910) 216 U.S. 462.

He has made such determination by requesting leave of Court to dismiss the indictments in this District. His de-

cision in that regard appears to be based on good reason, i.e., that the offense was probably not committed in this District, but was probably committed in the District of Columbia. 18 USC §1001; 29 USC 159(h); *United States v. Valenti* (3 Cir.) 1953, 207 F. 2d 242; see also *U. S. v. Lombardo*, 1916, 241 U. S. 73.

Leave to file dismissals of the indictments is granted.

Dated: November 24, 1953.

Louis E. Goodman,
United States District Judge.

United States District Court
for the District of Columbia

Criminal No. 1618-53

United States of America,
v.
Hugh Bryson,

ORDER

This cause having come on for hearing before this Court on the several motions of the defendant to dismiss the indictment, for a hearing on the qualifications of the grand jurors, for a Bill of Particulars, for a list of Government witnesses, for a change of venue pursuant to Rule 21(b) of the Federal Rules of Criminal Procedure, for discovery and inspection pursuant to Rules 16 and 17(c) of the Federal Rules of Criminal Procedure, and on the motion of the United States to quash a subpoena duces tecum purportedly served on the United States Attorney by the defendant, written briefs on such motions having been submitted and upon consideration of the motions and arguments of counsel, and for cause shown, it is this 29th day of March, 1954,

Ordered:

1. That the defendant's motion to dismiss the indictment be, and the same hereby is, denied;

2. That the defendant's motion for a hearing on the qualifications of the grand jurors who returned the present indictment be, and the same hereby is, denied;

3. That the defendant's motion for a list of the witnesses the Government intends to present at trial be, and the same hereby is, granted;

4. That the defendant's motions for a Bill of Particulars and a supplemental Bill of Particulars be, in the respects stated in the motions, and the same hereby are, granted, and that the particulars shall be furnished to the defendant within 60 days of the date hereof.

5. That the defendant's motion for discovery and inspection pursuant to Rule 16 of the Federal Rules of Criminal Procedure insofar as it relates to books, papers, documents and objects obtained from, or belonging to the defendant, and all such items, or copies thereof, obtained from others by seizure or process, and material to the instant charges be, and the same hereby is, granted, and that such items or copies shall be furnished to the defendant within 60 days of the date hereof.

6. That the defendant's motion for production of documentary evidence before trial pursuant to Rule 17(c) insofar as it relates to any written statements of the defendant or any statements of witnesses signed or prepared by them and material to the instant charges be, and the same hereby is, granted, and that such statement or copies thereof shall be furnished to the defendant within 60 days of the date hereof.

7. That the subpoena duces tecum purportedly heretofore served on the United States Attorney be, and the same hereby is, modified to include only those statements of the defendant and of witnesses required by paragraph 6 of this Order, and in all other respects is quashed;

8. That this Order shall not be construed as a limitation of or as a restriction on the right of the Government to utilize other witnesses as the exigencies of the trial may warrant with the understanding that appropriate notice thereof and opportunity to inspect signed statements be given to the defense under conditions imposed by the Court in its discretion.

James W. Morris,
Judge.

No objection as to form.

Edward P. Troxell,
Assistant United States Attorney,
Attorney for United States of America.

Joseph Forer,
Attorney for Defendant.

In the United States District Court for the Northern District of California, Southern Division

No. 34105

United States of America,
Plaintiff,
vs.
Hugh Bryson,
Defendant.

MEMORANDUM OPINION

Murphy, District Judge.

This is a motion by the Government to vacate an order of the United States District Court for the District of Columbia and to quash a subpoena served under Rule 17(c) which is supplemental to that order. Defendant moves to quash the Government's motion.

The indictment was brought in the District of Columbia, charging, in three counts, violations of Title 18 USC, Sec. 1001, namely, that Bryson filed with the National Labor Relations Board NLRB Form 1081, "Affidavit of a Non-communist Union Officer", knowing that the same contained false representations to wit:

(1) That he was *not a member of* the communist party—charged in count one.

(2) That he was *not affiliated with* the communist party—charged in count two.

(3) That he *did not support* any organization that believed in or taught the overthrow of the United States Government by force, here specifically the communist party—charged in count three.

Defendant filed eight motions in the District of Columbia: (1) Motion to dismiss indictment; (2) Motion for Bill of Particulars; (3) Motion for Supplemental Bill of Particulars; (4) Motion for list of Government witnesses; (5) Motion for Discovery under Rule 16; (6) Motion to inspect certain documents in hands of United States Attorney under Rule 17(c); (7) Motion for a hearing on the qualifications of the Grand Jury; (8) Motion for transfer of the proceedings to the Northern District of California under Rule 21(b).

After the filing of memorandums and oral argument Judge Morris granted certain of the motions and parts of others. The motion to vacate encompasses Judge Morris' whole order. The ruling on the motion to transfer was reserved until the filing of the bill of particulars. The Government filed a motion for rehearing on certain of the motions granted which was denied.

The Government bill of particulars alleged that (1) the jurat of the affidavit was executed in San Francisco, California, and (2) the affidavit was mailed to the board in San Francisco and received by the board by mail. The defendant filed an admission to the effect that he signed and executed the affidavit in San Francisco, which was mailed at his request from that city. Judge Morris then ordered the case transferred to this District under Rule 21(b).

We are met at the threshold with the problem of whether venue is now properly laid in this District. I take it that

this Court, or indeed any other District Court has jurisdiction of criminal offenses against the United States (18 USC 3231) and thus this offense. Proving proper venue is part of the Government's case without which there can be no conviction. *U. S. v. Brathman*, 191 F. 2d 70 (2d Cir. 1951); *U. S. v. Jones*, 174 F. 2d 247 (7th Cir. 1949); *Moran v. U. S.*, 264 Fed. 768 (6th Cir. 1920). Unless venue is properly laid, or unless any defect can be waived by the defendant and has already been waived, it is absurd for this Court to extend the use of its proceedings toward a conclusion which in the end may be nugatory. Cf. *In re Schleindt*, 74 F. Supp. 618 (D. Ore. 1947). We need not trace this problem to the disposal of criminal cases in the vicinage which predates the Norman Conquest for it has been crystalized in the Constitution. Article III, Sec. 2, provides in part:

> "The trial of all crimes . . . shall be by jury and such trial shall be held in the State where the said crime shall have been committed; . . ."

And in the Sixth Amendment it is provided:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherever the crime shall have been committed . . ."

Venue is now governed by Rule 18 which dictates that "Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed."[1] A transfer under Rule 21(b), which occurred here, requires that two conditions be met:

[1] This venue provision was substantially the same before the Rules and was contained in a statute—former Sec. 114 of Title 28.

(1) that it appear from the indictment or information, or from a bill of particulars "that the offense was committed in more than one district" . . . one of which must be the district to which the proceedings are transferred, and (2) that the transferring court be satisfied the proceeding should be transferred in the interests of justice.[2]

Thus proper venue in this district, either as a constitutional matter or as a matter of the rules depends upon the indictment and bill of particulars showing that the offense was committed in this District. There is dicta to the effect that a Rule 21(b) transfer is not reviewable by the receiving district. *Holdsworth v. U. S.*, 179 F. 2d 933, 937 (1st Cir. 1950).[3] I agree that the transfer insofar as it is discretionary with the transferring court probably can not, and at least should not be reviewed by the receiving court in the absence of a change of circumstances. The question of whether the interests of justice will be served by transfer is discretionary. But the other necessary condition of transfer—that the offense was committed in the receiving district—I do not view as discretionary. I consider it proper, indeed my duty, to review this determination, at least to insure that the exercise of jurisdiction by this Court will not be impotent.

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[2]Rule 21(b) is not technically an exception to Rule 18 since its exercise requires that the offense be committed in the district to which the proceedings are transferred. Venue was and is properly laid in a district in which the crime was committed. 18 USC §3237. Formerly in the case of a crime committed in two districts, the Attorney General was required to make an election. Haas v. Henkel, 216 U.S. 462 (1910). The proper district is now in the discretion of the court under Rule 21(b).

[3]The Holdsworth case held that an order by the receiving court holding that venue was not properly laid there and returning the case to the sending court was interlocutory and therefore not reviewable.

There is doubt in my mind that the offense charged is of a type that can be committed in this District by executing and mailing the affidavit here. Cf. *U. S. v. Valenti*, 207 F. 2d 242 (3rd Cir. 1953); see — Judge Goodman's Order granting leave to dismiss indictment in *U. S. v. Bryson*, Crim. No. 33559 and 33630 (N. D. Calif. 1953); and cf. Judge Carter's Order in Crim. No. 33630 (N. D. Calif. 1953). But as I view the venue problem, I need not decide this question. The defendants have waived any question of proper venue by requesting the transfer.

The Circuits which have considered the problem have uniformly held that the Constitutional provisions are not jurisdictional and can be waived.—Second Circuit: *U. S. v. Jones*, 162 F. 2d 72 (2d Cir. 1947); *U. S. v. Lotsch*, 102 F. 2d 35 (2d Cir. 1939); Third Circuit: cf. *U. S. v. Gallagher*, 183 F. 2d 342 (3rd Cir. 1950); Sixth Circuit: *Shetterly v. U. S.*, 205 F. 2d 834 (6th Cir. 1953); cf. *Earnest v. U. S.*, 198 F. 2d 561 (6th Cir. 1952); Eighth Circuit: cf. *Levine v. U. S.*, 182 F. 2d 566 (8th Cir. 1950) (cert. den. 340 U. S. 921); Ninth Circuit: *Rodd v. U. S.*, 165 F. 2d 54 (9th Cir. 1947), cf. *Nemec v. U. S.*, 191 F. 2d 810 (9th Cir. 1950); Tenth Circuit: *Mahaffey v. Hudspeth*, 128 F. 2d 940 (10th Cir. 1942); District of Columbia Circuit: *Hagner v. U. S.*, 54 F. 2d 446 (D. C. Cir. 1931) aff'd 285 U. S. 427 (1932) holding that the constitutional question need not be decided.[1] Although none of these cases discussed the waiver of a venue provision contained in the Rules or in a statute,

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[1]Judge Fee is of a different view. See *U. S. v. Bink*, 74 F.Supp. 603 (D. Ore. 1947); cf. *U. S. v. Bishop*, 76 F.Supp. 866 (D. Ore. 1948). See: *U. S. v. Holdsworth*, 9 F.R.D. 198 (D. Me. 1949) which treats the constitutional provision as jurisdictional. This approach was disapproved on appeal. *Holdsworth v. U. S.*, 199 F.2d 933 (1st Cir. 1950).

nearly all of them were decided while venue was controlled by former Section 114 of Title 28 which provided that all prosecutions shall be had "within the division of such districts where the same were committed. . . ." Venue as between divisions could be waived. *Silverberg v. U. S.*, 4 F. 2d 908 (5th Cir. 1925). If venue as a constitutional right can be waived, venue as a statutory right certainly can be.

The defendant has waived any question of proper venue. There is dicta in *Holdsworth v. U. S.*, 179 F. 2d 933, 937 (1st Cir. 1950) that a request to transfer under Rule 21(b) is such a waiver. This circuit has held that the objection to venue is waived by failure to object in the trial court even when the indictment shows on its face that venue is not properly laid. *Rodd v. U. S.*, 165 F. 2d 54 (9th Cir. 1947). Although the venue question can normally be raised even by a motion for judgment of acquittal and the time for any such motion appears to be in the distant future, I hold that the defendant's acts here have finally and unequivocally waived any question of venue. I can think of no more explicit choice of forum that that exercised here. Proper venue in this case is a close question. The defendant's attorney made a motion for transfer under Rule 21(b) supported by a twenty-four page memorandum of points and authorities. The defendant filed a three page affidavit insisting that justice could be served only in this District and stating that the transfer would be in accord with the principles of Rule 18, the Sixth Amendment and Article III of the Constitution. The Government originally opposed the motion but when the defendant signed an admission of the facts on which he based his application under Rule 21(b), the Government withdrew the objection.

Defendant in a prior similar indictment brought in this District moved to dismiss on the grounds that venue was not properly laid here. The opposite of the position taken in the case in the District of Columbia. This vacillation is at an end. This case will not be whip-sawed between districts. The case will be tried here.

This brings us to the motion to vacate the order of the District of Columbia District Court.

The first question is the power of the court to vacate such an order. Rule 21(c) provides that when a transfer is ordered the file shall be transferred to the receiving court "and the prosecution shall continue in that district or division." This rule envisions a continuity of procedure and under it this Court has the same power as would obtain in the transferring court had the case not been so transferred. Interlocutory orders are not res adjudicata (In re Walton Hotel Co., 116 F. 2d 170 (7th Cir. 1940) and courts possess the power to modify them.

Although defendant's counsel in his motion to quash the Government's motion intimates that the prior adjudication is final, in oral argument he conceded that the power to vacate exists. Defendant insists, rather, that the power should not be exercised here.

He argues that sound judicial procedure requires that once a matter has been fully presented, argued and decided, it should be laid at rest in the absence of a showing of new circumstances. In a broad sense this approach is eminently sound.

There is another factor present here. Although pre-trial procedures in all districts are governed by substantially

the same rules and should therefore be uniform in content and approach, the sad and plain fact is that in practice they are not. The pre-trial procedure has no function independent at the trial its *if*. It is auxiliary and subordinate to the trial. I am firmly convinced that such procedure should reflect and be consistent with, indeed be governed by, the procedure in the district where the trial will be had. After a careful reading of all the file, I believe that had the motions been presented to me as an original proposition, I would have denied them all. But this is not the test. Insofar as the prior ruling is based upon an approach to criminal trials which is different from the approach that exists in this District or conflicts with the settled practice in this District, the order should be vacated. The individual portions of the order of the District of Columbia Court will be taken up seriatim.

A. *The defendant's Motion for a Bill of Particulars.* The approach to this problem is considerably different in the courts of District of Columbia and in the Courts in this Circuit. Compare *U. S. v. Lattimore*, 12 F. Supp. 507 (D.C. D.C. 1953) with *Remmer v. U. S.*, 205 F. 2d 277 (9th Cir. 1953). See *Fredrick v. U. S.*, 163 F. 2d 536 (9th Cir. 1947). I can only reiterate what I said in the same matter in Criminal No. 33559, (N. D. Calif. 1953), and which was reaffirmed by Judge Carter in Criminal No. 33630 (N. D. Calif. 1953). I believed it to be the law in this Circuit then, and believe it to be now. "It is urged that the particulars requested would simply require the Government to state the overt acts upon which the indictment is based. If this were done, it would in my opinion, force the Government to spread before the accused the entire case. Such is

not the function of a bill of particulars." That portion of the order will be vacated.

B. *Motion for a List of Government Witnesses.* The District of Columbia Court ordered that the Government furnish to defendant a list of witnesses the Government intended to present at the trial, but provided that the Government could use other witnesses as the exigencies of the trial might warrant with the understanding that appropriate notice thereof and opportunity to inspect signed statements be given to defense under conditions imposed by the court in its discretion. The short answer is that this is not done in this District. It is perfectly clear that no right exists in a non-capital case to obtain these names. With no intention to disparage in any way the attorneys or indeed anyone connected with this case, this Court recalls that in a case not so long ago tried here, it was necessary here to guard the Government witnesses and that when the guards were removed one witness was severely beaten. We would be naive if we did not recognize that witnesses in criminal cases are subject to pressures from all sides. The rights of the defendant against undue surprise can be, and I am sure will be, amply protected by the trial judge. This portion of the order will be vacated. As an aside, we might add that the defendant already knows the names of some thirteen government witnesses. The practice in the District of Columbia of requiring a plea and setting a trial date on arraignment put in motion the subpoena process to the Government witnesses. The returns to these subpoenas are in the file.

C. *Order under Rule 16.* The District of Columbia Court ordered the discovery and inspection of all books,

papers and documents obtained by the Government from the defendant and all such items obtained from others by seizure and process. Rule 16 is a discovery rule and this type of material can be reached by the Rule in this District upon a showing of good cause. Although from my reading of the file no such good cause has been shown, the procedure used does not conflict with that used in this District. The discretion of the District of Columbia Court in deciding that good cause exists will not be overturned. The motion to vacate as to that portion of the order is denied.

D. *Inspection pursuant to Rule 17(c).* The District of Columbia Court ordered the United States Attorney to produce before trial all written statements of the defendant and any statements of witnesses signed or prepared by them, material to the instant charge, in the hands of the United States Attorney. The District Judge relied expressly on *Fryer v. United States*, 207 F. 2d 134 (D. C. Cir. 1953). That case is certainly the law in the District of Columbia Circuit when applied to a capital case, but there is disagreement among the District Judges in the District of Columbia as to its applicability in non-capital cases. See Judge Holtzoff's opinion in *U. S. v. Carter*, 15 F. R. D. 697 (D.C.D.C. 1954). In any event, the *Fryer* case is not the law in this District. *U. S. v. Herzog*, Criminal No. 33968 (N. D. Calif. 1954). The prior order will be vacated. There will be substituted an order directing the United States Attorney to allow prior to trial the inspection of any written, signed statements by the defendant. These are evidentiary. The United States Attorney will be directed to exhibit to defense counsel at the trial after any witness is called and sworn in behalf of the Govern-

ment, any and all written, signed statements previously obtained by the Government from that witness.

The defendant's motion to quash the Government motion to vacate is denied.

The United States Attorney will prepare and submit an appropriate order.

Dated, September 28, 1954.

Edward P. Murphy,
United States District Judge.

United States Court of Appeals
for the Ninth Circuit

Hugh Bryson, Appellant, vs. United States of America, Appellee.	Jun. 20, 1955

Motion for Reduction of Bail

Before: Denman, Chief Judge and Bone and Orr, Circuit Judges

Denman, Chief Judge:

Bryson, appellant, moves for a reduction of bail pending appeal from the amount of $50,000 allowed by United States District Judge Mathes acting under Rule 46(a) (2) and (c) of the Federal Rules of Criminal Procedure.

The question before us is whether Judge Mathes abused his discretion in fixing the bail at this high amount. In determining that question we are controlled, as was Judge Mathes, by the provisions of Rule 46, the pertinent portions of which are:

> "(a) (2) Upon Review. Bail may be allowed pending appeal or certiorari only if it appears that the case involves a substantial question which should be determined by the appellate court. Bail may be al-

lowed by the trial judge or by the appellate court or by any judge thereof or by the circuit justice."[1]

* * *

"(c) Amount. If the defendant is admitted to bail, the amount thereof shall be such as in the judgment of the commissioner or court or judge or justice will insure the presence of the defendant having regard to the nature and circumstances of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail and the character of the defendant."

(A) *The appeal presents a substantial question.*

The Chief Judge is of the view that the indictment charged in count one that Bryson violated 18 U.S.C. 1001 in filing on April 26, 1951, an affidavit required by Section 9(h) of the Labor Management Relations Act of 1947, stating he then and there was not a member of *the* Communist party, whereas he was in fact a member of *the* Communist party. On this charge of membership in some unnamed one of the Communist parties he was acquitted.

Count two charged violation of the above acts by filing an affidavit on April 26, 1951 that he was not an "affiliate of *the* Communist party," whereas he then was an "affiliate of the Communist party." On this last charge he was convicted. It is obvious that the appeal may present several substantial questions. One is to the validity of the indictment with reference to the phrase "*the* Communist party" without the statement of which one of the various communist parties, such as the Communist parties in the

[1]Since we are considering allowing release on bail we must determine the existence of a substantial question.

several states and the Communist party of the United States, was intended. Does such a phrase sufficiently inform one when making the affidavit of the character of the offense and thus comply with the requirement of precision required in drafting a criminal statute?

A Communist party well may seek to establish Marxism socialism, without seeking to overthrow the Government by force, as did the Russian Mensheviks, the second largest party in Russia at the time of the revolution. See American Bar Association circulated Statement on Communism, pages 10 and 18.

Since there may be various Communist parties some of whom do not seek the overthrow of Government by force, must not 9(h) be construed to require that the affidavit deny membership or affiliation in a Communist party "*and* that he does not believe in or teach . . . the overthrow of the United States Government by any illegal or unconstitutional methods", the latter phrase identifying the kind of affiliation in the party which he occupied? Does he violate the Act if his affidavit is not false both as to affiliation and belief?

We are all agreed on the question as to what the words "affiliated with" mean. The definitions of Webster's dictionary of these words are "Intransitive: 1. To connect or associate:—followed by *with*; as, they affiliate with a party. To be friendly, to fraternize. U. S."

If "affiliate with" means "connect with" what are the kinds of connections intended by the statute, which a person must have in mind when he makes his affidavit? Did Congress mean that the affiant, when he made his affidavit, was to consider that he was falsely swearing to lack of

affiliation, if he was merely friendly to the Communist party?

Further, assuming that the phrase "affiliated with" makes the statute one that is enforceable, there arises the question of the instructions given by the court as to the nature of affiliation, which we understood at the hearing on the motion was agreed to present a substantial question.

The judge himself certifies that there is a substantial question and our required determination agrees with his.

B. *The requirement of a bond for $50,000.00 would keep the appellant in jail for many months, perhaps for more than a year.*

The uncontradicted evidence before us is to the effect that Bryson has not the means to raise and cannot raise through his friends a bond for $50,000. Though these facts were before Judge Mathes he nevertheless required that amount and this despite the provision of Rule 46 that he should consider "the financial ability of the defendant to give bail."

This means that unless the bail be reduced Bryson will be confined in jail for the period of his appeal in this court and for the period in which certiorari is sought and granted or denied and if granted until the Supreme Court decision. Since this is a case of first instance and also involves a number of substantial questions, it is quite likely that certiorari may be granted. If it be granted and any of the substantial questions are resolved in favor of Bryson, he will have taken out of his life by imprisonment a period of something like a year at least. In the case of Bridges

v. United States, 346 U. S. 209, in which bail was granted, the notice of appeal was filed in this court on July 6, 1950. The case was decided here against Bridges. Certiorari was granted and the final judgment of reversal by the Supreme Court was made in June 1953. It is thus apparent that, as in that case, a similar period could expire for Bryson and nearly three years could be taken out of his life, that is, nearly three-fifths of his sentence.

As will later appear, such a result would be in complete disregard of the principle established by the Supreme Court in the case of *Hudson v. Parker,* 156 U. S. 277, at page 285:

> "The statutes of the United States have been framed upon the theory that a person accused of crime shall not, until he has been judged guilty in the court of last resort, be absolutely compelled to undergo imprisonment or punishment but may be admitted to bail, not only after arrest and before trial, but after conviction and pending a writ of error."

C. *Bryson's likelihood of flight to escape prosecution is but that of the normal case and the bail should be fixed at the usual norm in appeal cases.*

The record shows that the United States Attorney prosecuting Bryson stated at the time of the fixing of bail during appeal by Judge Mathes that no question of Bryson's likely flight was involved. The attorney then was asking for bail of not less than $30,000.00. This statement of the prosecutor of absence of Bryson's likelihood to flee is supported by all the facts before Judge Mathes.

It appears that Bryson has no prior record of convictions of any offenses, felony or misdemeanor. For many

years of his life he was an American merchant seaman, subject to the jurisdiction of the United States Coast Guard; at no time was he ever charged or convicted of any violation of the rules or regulations of the United States Coast Guard. In all respects whatsoever, save and except for the conviction hereinabove mentioned, Bryson's record of conduct has been and is without blemish.

It further appears that Bryson has a home in San Francisco where he is living with his wife and four children, their ages ranging from six to one. The question of his flight to Mexico was raised and his testimony is that he has today no connections with anyone in Mexico and that he had visited Mexico but once in 1951 to see relatives of a former wife. He further testified that he had never been in Canada and has no connections there.

Coupled with this there are of record in the files of this action statements of a large number of responsible citizens of California to the effect that Bryson was a reliable and dependable person, such elements in his character being required to be considered by the last phrase of 46(c), "the character of the defendant."

That such a man with such chances of a reversal would flee from his home and wife and children, or flee with them, and for the rest of his life be a fugitive from justice, seems less likely than the usual case with the ordinary appellant in a criminal appeal.

The bail is ordered reduced to $20,000.00.

(Endorsed): Opinion on Motion for Reduction of Bail. Filed Jun. 20, 1955. Paul P. O'Brien, Clerk.

United States Court of Appeals
for the Ninth Circuit

Hugh Bryson, Appellant, vs. United States of America, Appellee.	No. 14,859 Nov. 30, 1956

Appeal from the United States District Court for the Northern District of California, Southern Division

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Before: Chambers, Circuit Judge, and Hamlin and Solomon, District Judges.

Solomon, District Judge:

Hugh Bryson, president of the National Union of Marine Cooks and Stewards, was tried on two counts of an indictment which charged that he filed with the National Labor Relations Board "an affidavit of a non-Communist union officer", in which he falsely alleged that he was "not a member of the Communist Party or affiliated with such Party." He was charged with falsely denying membership in the first count and affiliation in the second count, all in violation of §1001, Title 18, United States Code. The jury acquitted him on the membership count but found him guilty on the affiliation count. From a judgment of conviction and a sentence of five years imprisonment plus a $10,000 fine, Bryson appeals.

As early as 1937, Bryson was an active and militant member of both the Communist Party and the Marine Cooks and Stewards. He frequently caucused with other Communist members of the union for the purpose of influencing the union's meetings, elections and policies. Thereafter, and particularly between 1941 and 1947, the evidence showed that Bryson attended many Communist Party meetings. He solicited new members and participated in the expulsion of old ones. He was a member of the county and state committees of the Party. He acted as chairman of some meetings and gave "educational" talks at others. In one of these talks to new members he stated, "When you are in the Communist Party you accept discipline. You ask no questions . . . for the good of the party you carry out any order that is given to you from the top fraction and you ask no questions."

Bryson's rise in his union was rapid. In 1937, he was a rank and file member of the San Francisco local; in 1947, he became national president of the union.

By 1947, Communist domination of labor unions was recognized as a national problem; for communists in great numbers had infiltrated union organizations not for proper and legitimate union objectives, but for the purpose of engaging in obstructive strikes called by the Communist Party often to support policies of a foreign government.[1] Congress, in an effort to rid unions of communist domination, enacted §9(h) of the Labor Management Relations Act, 1947, 61 Stat. 136, 146, 29 U.S.C.A. §141, 159(h), pop-

[1]For a discussion of the reasons which motivated Congress in enacting the legislation, see *American Communications Assn. v. Douds*, 339 U.S. 382 (1950), particularly pp. 388-389.

ularly called the Taft-Hartley Act. §9(h) provides that no representation cases and no unfair labor charges may be asserted by unions before the National Labor Relations Board until and unless each of their officers file with the Board affidavits that they are not members of or affiliated with the Communist Party or of any other organization that believes in or teaches the overthrow of the United States Government by force or by any illegal or unconstitutional methods. §1001 of Title 18, which provides penalties for false statements, was made applicable to such affidavits.

The Communist Party was concerned over the effect that this law would have on its influence in labor unions. At a meeting held in San Francisco during the summer of 1947 to discuss this problem, Leonard Kaplan, the trade union director of the Communist Party, who presided at the meeting, announced that it would be Party policy for Party members in labor unions to boycott the Taft-Hartley Act for the present, but if rival unions should raid their membership or involve them in jurisdictional disputes, they would resign from the Party in name only but remain in close touch and alliance with the Party. He further stated, "The Communist Party has spent many years in building and training leadership for the more progressive unions on the West Coast and they were not going to sacrifice that overnight by complying with the Taft-Hartley Act."

Bryson stated in reply that he did not see any need to comply with the Act for the present but that an impending struggle between his union and the rival Sailor's Union of the Pacific might make it necessary to file an affidavit at a later time.

Although there was no evidence of Bryson's attendance at Communist Party meetings subsequent to 1947, Clarence Ward, a member of Bryson's union, testified that Bryson urged him to go to Georgia and get signatures for the Progressive Party. He told Ward that the "Progressive Party isn't the Communist Party, but they have a program—the best program and we want to work hand in hand with them. Bryson offered to do things for Ward if he helped the Communist Party get Wallace on the ballot.

Ward also testified that in 1949 he was in an argument with Bryson over whether he would be seated at the union convention and whether he would get his expenses. Bryson told him that he had been given an opportunity to join the Communist Party but, instead, continued to fight the Party.

In the years following the enactment of the Taft-Hartley Act, unions whose officers had signed non-Communist affidavits attempted to take over the membership and job areas of non-qualifying unions. The Marine Cooks and Stewards was being harassed by other unions, particularly by the National Maritime Union. In this effort the other unions were aided by dissatisfied members of the Marine Cooks and Stewards. In April, 1951, and during the course of these struggles, Bryson and the other officers of the union, in order to be able to use the machinery of the National Labor Relations Board to protect the union against these attacks, swore that they were neither members of nor affiliated with the Communist Party.

In July, 1951, John Tiernan was being tried by the Marine Cooks and Stewards on the ground that he was guilty

of dual unionism. After the trial and while he was arguing with Bryson, Tiernan said "The American people are getting sick and tired of the Communist Party and their carryings-on in unions." To this Bryson replied, "If you are referring to me, I'm still a Communist and proud of it."

In the same month, two other union members, Stewart and Whitelaw, came to Bryson's office to ask for job assignment slips. Both of them had been assisting a rival union. As they were waiting to enter Bryson's office, they heard Bryson telephone for assignment slips for two other men who were in his office. However, when Stewart and Whitelaw asked for assignment slips, Bryson told them that he did not issue them. Stewart then called Bryson's attention to the fact that he had just arranged for assignment slips for the other men. When Whitelaw asked what a man had to do to get his job back, Stewart said, "Yes, belong to the Communist Party?" Bryson answered, "That might help." Stewart testified that he then said to Bryson, "Now comes the $64 question, Hugh. Tell me, are you a member of the Communist Party?" To this Bryson answered, "Yes, and I'm proud of it."

In his defense Bryson called 16 witnesses. They testified that Bryson's reputation for truth and veracity was good and that the reputations of the prosecution's witnesses, many of whom harbored deep animosity towards Bryson, were bad. They contradicted witnesses who had placed Bryson at particular Communist Party meetings and who had claimed that Bryson made admissions that he was a member of the Communist Party.

Bryson did not testify.

Bryson's first and principal contention is that the evidence is insufficient to support the jury's verdict that he was affiliated with the Communist Party at the time he filed his non-Communist affidavit.

Before considering that question, we shall first examine his objections to specific portions of the evidence to determine which evidence was properly admitted.

Bryson asks us to disregard as inadmissible hearsay, Leonard Kaplan's statements of Communist Party policy towards the non-Communist affidavit provision of the Taft-Hartley Act made at the Party meeting held in San Francisco in 1947.

These statements were properly admitted on the theory of "testimonial completeness." Bryson's reply to Kaplan becomes understandable only in the light of the statements to which he was replying. Here the principal fact was Bryson's intention as expressed in his reply. Other facts which were necessary to place the principal fact in its true light and which were part of the same transaction were admissible. *Beaver v. Taylor* (1863), 68 U. S. 637.

Irrespective of Bryson's reply, the Government was entitled to prove that it was Communist Party policy for its labor union members to assume a clandestine relationship to the Party in the event it became necessary for them to file non-Communist affidavits. The relevance of this Party policy is manifest. Even apart from its acceptance by Bryson when it was announced at the San Francisco meeting, his proven knowledge of the policy and his strict and unquestioning obedience to Party directive would tend to

show that he did comply with this policy. This, in turn, would tend to explain the absence of evidence of Bryson's active participation in Party functions after 1947, a deficiency which otherwise might be taken to indicate that Bryson had severed his connections with the Party. In fact, it is apparent from this and similar cases[2] that the Party adopted this policy precisely for the purpose of making it difficult to prove the falsity of non-Communist affidavits executed by Party members.

This method of proof, whereby the commission of future acts is inferred from an earlier intent to perform those acts, was sanctioned in the much-cited case of *Mutual Life Insurance Co. v. Hillmon*, 145 U. S. 285 (1892). Under the rule in that case, proof of intent may be made through declarations and expressions which tend to show present intent, as an exception to the hearsay rule. See also *Mattox v. News Syndicate Co.*, 2 Cir. 1949, 176 F. 2d 897.

The policy of an organization, like the intent of an individual, can only be inferred from the acts and declarations which manifest it. We think that the *Hillmon* state-of-mind exception to the hearsay rule applies to organizations as well as to individuals, and that the policy of an organization, if relevant, may be proved through the declarations of its spokesmen. Leonard Kaplan, the trade union director of the Communist Party, was such a spokesman.

The Government must establish Bryson's affiliation with the Communist Party as of April, 1951, the date of the

[2] *Fisher v. United States*, 9 Cir. 1956, 231 F.2d 99;
Jencks v. United States, 5 Cir. 1955, 226 F.2d 540;
Hupman v. United States, 6 Cir. 1955, 219 F.2d 243.

affidavit. Although there is substantial evidence of Communist affiliation during earlier periods, the two admissions in July, 1951, are the only proved manifestations that the relationship existed beyond 1949. Bryson addresses three objections to the consideration of this important testimony.

He first contends that the testimony is not credible. He points out that the witnesses to these admissions were his bitter enemies, and he argues that their testimony that he admitted Communist membership to them, within three months after filing with the National Labor Relations Board an affidavit to the contrary, is inherently incredible. He also points out that they did not mention these admissions when they testified about these conversations in prior hearings. Neither did they mention them to the National Maritime Union official for whom they were attempting to enlist members of Bryson's union, even though such information would have been of great value against Bryson and his union.

It was for the jury to evaluate these credibility factors in determining the value of the evidence. Findings of fact by a judge may be reversed where clearly erroneous,[3] but appellate review of jury verdicts has long been limited to the legal sufficiency of the evidence to support the verdict. The weight of the evidence, including all factors of credibility which do not render the testimony incredible as a matter of law is beyond the scope of appellate review of jury verdicts. *Burton v. United States*, 202 U. S. 344 (1906); *Humes v. United States*, 170 U. S. 210 (1898);

[3]Rule 52(a), Federal Rules of Civil Procedure.

France v. United States, 164 U. S. 676 (1897). We are unable to reject the challenged testimony on this ground.

Bryson's next ground of attack on the two 1951 admissions is that they were not corroborated by independent evidence. He contends that admissions made subsequent to the commission of the alleged offense must be corroborated.

The requirement for corroboration of admissions by an accused was recently examined by the Supreme Court in *Opper v. United States*, 348 U. S. 84 (1954), and in *Smith v. United States*, 348 U. S. 147 (1954). These decisions extended to admissions the same corroboration requirements which traditionally have applied to confessions. Although both these cases were decided on the same day they apparently disagree on whether corroboration is required for all admissions which are made subsequent to the commission of the alleged offense. The *Opper* case appears to hold that all admissions made after the fact must be corroborated.[4] The *Smith* case suggests that corroboration may not be required in cases other than those in which the admission is made after the fact to an investigating agent on a fact crucial to the Government's case.[5]

The admissions in the present case fall within this area of doubt because they were made after the fact but not to an investigating agent. However, we are not required to decide whether these admissions could stand without corroboration because the record does contain adequate corroborating evidence.

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[4]348 U. S. 84, 90.

[5]348 U. S. 147, 155, Footnote 3.

The *Opper* and *Smith* decisions agree that where corroboration is required, the corroborating evidence need not independently establish the admitted facts. It is sufficient "if the corroboration merely fortifies the truth of the confession, without independently establishing the crime charged." *Smith v. United States*, supra, at p. 156.

The reliability of Bryson's admissions in July, 1951, that he was a Communist is greatly increased by the evidence of his active membership and leadership in the Party from 1937 to 1947, the Party policy adopted in 1947 whereby union leaders would drop open ties with the Party so that they could comply with the Taft-Hartley Act while remaining in close touch and alliance with the Party, and Bryson's statements and activities in 1948 and 1949 indicating that he was still working for the Party.[6] This evidence is adequate corroboration for the admissions of Communist Party membership in 1951 within the rule set out in *Opper* and *Smith*.

Bryson's last objection is that the admissions made in 1951 have no probative value and must be disregarded because these admissions, if believed, established membership, and since the jury acquitted him on the membership count they demonstrated their disbelief in this testimony.

The law does not support this contention. A verdict on one count of an indictment cannot have the effect of determining factual issues under another count, even though the same evidence is offered in support of both counts. The legal sufficiency of the evidence to support each verdict

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[6]Statements made in 1948 and 1949 by Bryson, if they constitute admissions, require no corroboration because they were made before the fact. *Warszower v. United States*, 312 U. S. 342 (1941).

must be determined without reference to the other. *Dunn v. United States*, 284 U. S. 390 (1932). Thus the verdict of the jury acquitting Bryson of the charge of falsely denying membership in the Party does not require us to disregard these admissions of membership in determining the sufficiency of the evidence to support the conviction dealing with affiliation.

Having disposed of these objections to specific portions of the evidence, we now turn to the sufficiency of the evidence to sustain the verdict as a matter of law. There is no question about the execution and filing of the affidavit. Our problems lie in the proof of its falsity. We have already detailed the evidence of Bryson's membership and activities in the Party, the leadership which he exercised, his knowledge of the Communist Party policy towards the non-Communist affidavit provisions of the Taft-Hartley Act, his strong belief and obedience to Communist Party directives, and his admissions of Party membership and activities both before and after the dates upon which the affidavit was executed and filed. Although the affidavit was executed two years after and three months before the nearest evidence of Bryson's relationship to the Party, we believe that the evidence as a whole was sufficient to warrant the jury's inference that the relationship continued throughout this interval and existed at the time he executed and filed the non-Communist affidavit.

As we have already pointed out, the absence of evidence on Bryson's active participation in Party functions after 1947 is explained by Party policy which required their union leader members to avoid open participation in Party affairs. Under these circumstances, the evidence of Bry-

son's manifestations of Party membership and activity in 1948, 1949 and 1951, although infrequent, were sufficient to justify the inference that the relationship continued throughout this period.

At the oral argument, Bryson suggested that affiliation could only be proved by overt acts showing his adherence to the illegal and illict objectives of the Communist Party and could not be proved by mere membership in the Party. For this contention he relies on certain language in *Bridges v. Wixon*, 326 U. S. 135, 143 (1945).[7]

Can a person who is proved to have been a member of the Communist Party successfully claim that he was not affiliated with it? To the layman this suggestion would be absurd. The law does not require a different result. The *Wixon* case stated that the term "affiliation" imports less than membership but more than sympathy.[8] Accordingly, proof of membership would establish affiliation a fortiori. Although in the *Wixon* case an immigration statute was being construed, we believe that this reasoning is equally applicable here.

Bryson's next assignment of error concerns the charge to the jury on the proof necessary to establish affiliation.

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[7] "• • • Whether intermittent or repeated, the act or acts tending to prove 'affiliation' must be of that quality which indicates an adherence to or a furtherance of the purposes or objectives of the proscribed organization as distinguished from mere cooperation with it in lawful activities. The act or acts must evidence a working alliance to bring the program to fruition."

[8] The instructions of the court on affiliation are as follows:

"The verb 'affiliated', as used in the Second Count of the indictment, means a relationship short of and less than membership in the Communist Party, but more than that of mere sympathy for the aims and objectives of the Communist Party.

"A person may be found to be 'affiliated' with an organization, even though not a member, when there is shown to be a

Bryson contends that the court erred in failing to instruct the jury that proof of affiliation must show an adherence to or furtherance of the purposes and objectives of the Communist Party as distinguished from mere cooperation with it in lawful activities.

An instruction to this effect would have been a correct statement of the law.[9] However, Bryson did not request such an instruction or any other instruction on affiliation at the trial stage even when the jurors interrupted their deliberations to request clarification on the definition of affiliation. Under Rule 30, Federal Rules of Criminal Procedure, Bryson's failure to object to the omission of this

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close working alliance or association between him and the organization, together with a mutual understanding or recognition that the organization can rely and depend upon him to cooperate with it, and to work for its benefit, for an indefinite future period upon a fairly permanent basis.

"Briefly stated, affiliation as charged in the Second Count of the indictment, means a relationship which is equivalent or equal to that of membership in all but name.

"I tried to think of some analogy which would make that possibly clearer to you, and the best one I can think of—we have all in our experience probably heard of a man and woman who live together but are not married. They are husband and wife in everything but name only. You have probably heard that expression. A person to be affiliated with the Communist Party within the meaning of that term as used in the Second Count of the indictment must be a member in every sense and stand in the relationship of a member in every sense but that of the mere technicality of being a member,—in everything but name

* * * *

"If you should find from the evidence that the defendant was a member of the Communist Party or affiliated with it during a period of years prior to April 21, 1951, but if you should also find that the evidence does not satisfy you beyond a reasonable doubt that such membership or affiliation continued to and including the 21st day of April, 1951, then it is your duty to acquit the defendant."

[9] *Bridges v. Wixon*, supra, 143-4.

instruction at the trial level precludes him from raising it on appeal.

If we are to consider this assignment, we must do so on our own motion under Rule 52(b), Federal Rules of Criminal Procedure, after finding that the omission may have resulted in a miscarriage of justice or denied Bryson a fair trial.[10] There is no basis for such a finding.

The instructions on the question of affiliation were full and complete. They adequately informed the jury of the meaning of the term and provided an adequate standard for evaluating the evidence. By likening affiliation to membership in everything but name, they benefited Bryson by requiring a higher standard of proof than was required under *Bridges v. Wixon*, supra, the case upon which Bryson relies. Membership imports adherence to the objectives of the Party, and therefore the instructions as given excluded the possibility that Bryson could be convicted on the affiliation count merely on proof that he cooperated with the Party in lawful activities, the danger which Bryson's present proposal is calculated to prevent.

It is true that the jury requested clarification of these instructions and that the request was denied. However, although the jury was told to renew this request if additional discussion failed to resolve their difficulties, they proceeded to verdict without making any further request.

The instructions on affiliation were adequate and certainly not erroneous, particularly in the absence of a timely request by Bryson for further amplification.

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[10] *Herzog v. United States*, 9 Cir. (on rehearing), 235 F.2d 664, 666-667 (1956); original opinion 226 F.2d 561 (1955).

In his last specification of error, Bryson claims that the trial court erred in prohibiting communication with members of the jury.

Immediately prior to the receipt of the verdict, the trial judge forbade everyone from communicating with any member of the jury without his permission. Despite this order, a newspaper reporter contacted jurors and reported that at least two of them expressed uncertainty as to the meaning of "affiliation." Based upon this report, Bryson asked to be relieved of the order so that he could interrogate the jurors on this subject. After a hearing, the court denied his application.

There was no impropriety in the court's original order prohibiting communicating with the jurors. In view of the nature and length of the trial and the wide publicity it received, the order was not only proper but was highly desirable.

This and other courts[11] have condemned the practice of interviewing jurors on the course of their deliberations in the jury room. It is incumbent upon the courts to protect jurors from the annoyance and harassment of such conduct. The order by the Honorable William Mathes, the able and experienced trial judge, was designed to accomplish that purpose and was proper.

Although interrogation of jurors may be prohibited as a general rule, it is permitted when there is some indication that grounds for impeachment of their verdict may be dis-

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[11] *Northern Pacific Railway Co. v. Mely*, 9 Cir. 1954, 219 F.2d 199, 201; *Rakes v. United States*, 4 Cir. 1948, 169 F.2d 739, 745, see also The American Bar Association Committee on Professional Ethics, Opinion 109, issued March 10, 1934.

closed thereby.[12] However, even if Bryson's interrogation had disclosed that the jurors had not understood the meaning of affiliation as it was defined by the court, such testimony could not be used to impeach the verdict since it dealt with a matter which inhered therein. *Young v. United States*, 10 Cir. 1947, 163 F. 2d 187, 188, cert. denied 332 U. S. 770 (1947). The denial of Bryson's request to be relieved of the original order was also proper.

Affirmed.

(Endorsed): Opinion. Filed Nov. 30, 1956.
Paul P. O'Brien, Clerk.

[12] *Mattox v. United States*, 146 U. S. 140 (1892).

United States Court of Appeals
for the Ninth Circuit

Hugh Bryson, Appellant, vs. United States of America, Appellee.	No. 14,859 Apr. 12, 1957

On Petition for Rehearing

Before: Chambers, Circuit Judge, and Hamlin and Solomon, District Judges.

Solomon, District Judge:

Bryson, in his petition for rehearing, contends that the instruction on affiliation was fatally defective and that our decision to the contrary is inconsistent with our decision in *Fisher v. United States*, 231 F. 2d 99 (1956). We find no inconsistency.

In evaluating the instructions on affiliation, we, as well as the court in the *Fisher* case, used the test stated in *Bridges v. Wixon*, 326 U. S. 135, 143 (1945). In that case, the Supreme Court declared that proof of affiliation must show an adherence to or a furtherance of the purposes and objectives of the Communist Party; as distinguished from mere cooperation with it in lawful activities.

In the *Fisher* case, the instruction defined affiliation as follows: "To connect or associate one's self with; to

adopt, hence usually to bring or receive into close connection; to ally." The court recognized that this instruction did not exclude the possibility that Fisher might have been convicted without proof that he adhered to the purposes of the Party. The conviction was therefore reversed.

In this case, the trial court instructed the jury that "A person to be affiliated with the Communist Party . . . must be a member in every sense and stand in the relationship of a member in every sense but that of the mere technicality of being a member—in everything but name." We think it self-evident, and Bryson himself all but concedes, that a member can be regarded as adhering generally to the purposes of his organization so as to satisfy the requirement of *Bridges v. Wixon*, supra. The limitation of affiliation to membership in everything but name provides the essential element which was lacking in the Fisher instruction.

In our original opinion, we considered the use in the trial court of evidence of Bryson's lawful political activities.[1] He claims that this amounts to punishment for engaging in lawful activities protected by the First Amendment.

The act under which he was charged does not punish political activities since it deals solely with false swearing.[2] Bryson was privileged to urge people to get signatures for the Progressive Party, but he had no constitutional right to lie about his connections with the Communist Party.

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[1] See *Bryson v. U. S.*, 238 F.2d 657 at 660.

[2] The indirect effects of the affidavit requirement in restraining political freedom were considered and held constitutional in *American Communications Association v. Douds*, 339 U.S. 382 (1950).

In essence, Bryson's argument is that no evidence of lawful conduct is admissible to prove a crime. This contention is patently without merit.

Bryson next contends that the Government must show that he was an active affiliate of the Communist Party on the date of his affidavit in order to punish him for falsely swearing that he was not so affiliated.[3] He cites as persuasive on this point a concession by a Government attorney, made during an oral argument in a Smith Act prosecution, that a person could not constitutionally be convicted under that law for inactive membership, even though membership under that law is an offense.[4] We do not decide the proposition as applied to the Smith Act,[5] but we are agreed that it has no merit as applied to §9(h) of Taft-Hartley.

The important difference between the two laws is that the Taft-Hartley Act, unlike the Smith Act, does not proscribe political affiliations or activities. It merely pro-

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[3]In support of this contention, Bryson cites as authority what he states to be a holding in *American Communications Association v. Douds*, supra, which in his petition for rehearing reads as follows:

"Before there can be a 'successful prosecution for false swearing' there must be proof of 'overt acts . . . done with knowledge that they contravene the statute.' (339 U.S. at 411-413)"

We have carefully examined this opinion, and we are convinced that it contains no such holding. We do not commend the practice employed by Bryson of presenting as a single quotation, material taken from portions of an opinion so widely separated that the three-dot symbol of omitted material represents two pages of text and a major subject matter division. While the construction of quotations necessarily involves discretion, the quoted material should fairly represent both the language of the original text and its meaning. Bryson's quotation meets neither test.

[4]Report of argument in *Scales v. United States* and *Lightfoot v. United States*, 25 U.S. Law. Week 3110.

[5]18 U.S.C.A. §2385.

scribes false swearing. Affiliation is a relationship which can exist even when not manifested by activity. It is a fact capable of being known, misrepresented and proved. We believe that the evidence of Bryson's connections with the Communist Party, both before and after the date of the affidavit, afforded an adequate basis from which the jury could properly infer that Bryson was affiliated with the Party at the time he executed his affidavit and that he knowingly falsified such relationship in this affidavis. Neither the Constitution nor §9(h) of the Taft-Hartley Act requires anything more.

Bryson also contends that the term "affiliation" as used in this statute is so vague that it violates the constitutional requirement of certainty in criminal legislation. *American Communications Association v. Douds*, supra, at p. 412, provides the answer to this argument. The court there stated that an abstract definition of affiliation which would eliminate all cases of doubt is not required in order to avoid the objection of vagueness. What is required is that the false statement shall have been made with knowledge that it was in violation of the statute. In this case, Bryson was found to have denied that he was affiliated with the Communist Party at a time when he was a member of the Party in everything but name. We think that a person who is a member in everything but name could not honestly and without taint swear that he was not affiliated with the Party. §9(h), as applied in this case, was not unconstitutionally vague according to that standard.

Bryson objects to our conclusion that the trial court properly admitted statements by the trade union director of the Communist Party concerning the Party's policy

towards the non-Communist affidavit provisions of the Taft-Hartley Act made at a Party meeting attended by Bryson.

We found that such testimony was admissible on the theory of testimonial completeness. We also found that it was within the state-of-mind exception to the hearsay rule.

Bryson claims that our analysis of the testimony as being within the state-of-mind exception to the hearsay rule was not only incorrect but also unfair, since the theory and two of the cases cited by us on this point had not been suggested in the briefs.

It would accomplish little to re-examine our analysis on this point since Bryson makes no objection to our holding that the testimony was admissible on the theory of testimonial completeness.

We have carefully examined each of Bryson's other contentions and find all of them without merit. The petition for rehearing and the application for a rehearing *en banc*, which we treat as a suggestion under our Rule 23, are denied.

(Endorsed): Opinion on petition for rehearing. Filed Apr. 12, 1957.

Paul P. O'Brien, Clerk.

United States Court of Appeals
for the Ninth Circuit

No. 14,859

Hugh Bryson,
Appellant,

vs.

United States of America,
Appellee.

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed) Judgment. Filed and entered November 30, 1956.

Paul P. O'Brien, Clerk.

United States Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Friday, April 12, 1957.

Before: Chambers, Circuit Judge, and Hamlin and Solomon, District Judges.

ORDER DIRECTING FILING OF OPINION ON PETITION FOR REHEARING

Ordered that the typewritten opinion on petition for rehearing this day rendered by this Court in above cause be forthwith filed by the Clerk.